Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

M&P INVESTMENTS, DAVID MUSTIN, ESTATE OF FRANK PAUL, JACK ALQUIST, GUILD CLEANERS, INC., ESTATE OF DWIGHT ALQUIST, PAUL MARIANI, VICTOR LEONARDINI, DELANO GOTELLI
Respondents,
CALIFORNIA ATTORNEY GENERAL
Amicus Curiae-Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This is an action to abate a public nuisance located within the City of Lodi, California. The Lodi City Attorney brought the public nuisance abatement claims in the name of the "People of the State of California" pursuant to statute. The District Court, however, ruled that "the real party in interest asserting the Plaintiff People's state law nuisance claims is the City of Lodi" thereby becoming the first court ever, in the more than 100 years of the statute's existence, to deprive a city attorney of his statutory authority to represent the People in an action to abate a local public nuisance. Since that ruling effectively sent the People out of court and left Lodi as the sole plaintiff, the People appealed to the Ninth Circuit in an effort to have themselves reinstated as a plaintiff. The Ninth Circuit, however, dismissed the People's appeal holding that the District Court's real party ruling was not immediately appealable. The People, therefore, are currently stuck on the sidelines waiting (probably for several years) for the case to reach final judgment so that they can then seek appellate review of whether or not they are entitled to participate in the case. As such, this petition presents the following issues:

(1) Is the District Court's unprecedented ruling that Lodi is the real party in interest for the People's public nuisance claims, thereby effectively sending the People out of court, an immediately appealable order?

(2) If so, who is the real party in interest for the People's public nuisance abatement claims, the People or Lodi?

PARTIES TO THE PROCEEDING

Petitioner

Petitioner is the People of the State of California, which consists of the citizens of the state, not as individuals, but as a single collective entity in which the state's sovereignty resides. (*See* Cal. Const., Art. 2, § 1; Cal. Gov. Code §§ 100, 240, 241.) Petitioner was the Appellant in the Ninth Circuit Court of Appeals and a Plaintiff in the District Court.

Respondents

Respondents are: (1) M&P Investments, a California general partnership in dissolution; (2) David Mustin, an individual; (3) the Estate of Frank Paul, a deceased individual; (4) Jack Alquist, an individual; (5) Guild Cleaners, Inc., a California corporation; (6) the Estate of Dwight Alquist, a deceased individual; (7) Paul Mariani, an individual; (8) Victor Leonardini, an individual; (9) Delano Gotelli, an individual; and (10) the Attorney General of the State of California, Bill Lockyer. Respondents were the Appellees in the Ninth Circuit and, with the exception of the Attorney General, are all Defendants or Third-Party Defendants in the District Court. Since the Attorney General is not a party to the action in the District Court, he is also listed here, as he was in the Ninth Circuit, as *Amicus Curiae*. Petitioner does not believe that Respondent Guild Cleaners, Inc. is a publicly traded corporation and, in any event, is unaware of any publicly held company that owns 10% or more of its stock.

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The People of the State of California ("People") respectfully petition the Supreme Court for a Writ of Certiorari to review the Ninth Circuit Court of Appeal's judgment and order dismissing the People's appeal in this case.

OPINIONS BELOW

The Ninth Circuit's judgment and order of dismissal (*see* App. B at 3a) is not reported. The District Court's Memorandum and Order (*see* App. C at 5a) is reported at *People of the State of California v. M&P Investments*, 213 F. Supp. 2d 1208 (E.D. Cal. 2002) ("*M&P*").

STATEMENT OF JURISDICTION

The Ninth Circuit's judgment and order of dismissal was entered on September 13, 2002. The Ninth Circuit entered an order denying the People's motion to reinstate their appeal on November 18, 2002 (*see* App. A at 1a). The People applied for an extension of time to file their Petition for Writ of Certiorari and, on December 6, 2002, Justice O'Connor granted their application and extended the time to Saturday, January 11, 2003. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This petition calls upon the Court to interpret and apply the following two statutory provisions:

(1) Federal Rules of Civil Procedure, Rule 17(a) ("Rule 17(a)") (*see* App. D at 34a), provides in relevant part: "Every action shall be prosecuted in the name of the real party in interest. . . . [A] party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought. . . ."

(2) California Code of Civil Procedure § 731 ("Section 731") (*see* App. D at 35a), provides in relevant

part: "A civil action may be brought in the name of the people of the State of California to abate a public nuisance . . . by the district attorney of any county in which such nuisance exists, or by the city attorney of any town or city in which such nuisance exists, and each of said officers shall have concurrent right to bring such action for a public nuisance existing within a town or city, and such district attorney, or city attorney, of any county or city in which such nuisance exists must bring such action whenever directed by the board of supervisors of such county or whenever directed by the legislative authority of such town or city."

STATEMENT OF THE CASE

The City of Lodi is faced with, as the California Supreme Court put it, "an environmental public nuisance amounting to . . . a tremendous and serious groundwater contamination problem within Lodi's city limits." (*Connecticut Indem. Co. v. Superior Court,* 23 Cal. 4th 807, 814 (2000) (internal quotation marks omitted).) The contamination was caused by releases of toxic chemicals into the environment over many decades by numerous businesses in Lodi.

Lodi entered into negotiations with the California Environmental Protection Agency's Department of Toxic Substances Control ("DTSC") to clarify the parties' mutual roles and responsibilities for responding to the contamination. Those negotiations culminated with the execution of a cooperative agreement. In that agreement, Lodi settled its potential liability, if any, related to "leaks" from its sewers of hazardous substances that had been placed there by others. Also, Lodi was designated the "lead enforcement entity" for the site and charged with the responsibility, in full cooperation and communication with DTSC, of diligently prosecuting appropriate environmental enforcement actions

against responsible parties to compel their prompt and comprehensive investigation into, and cleanup of, the contamination.

The Lodi City Attorney filed this lawsuit on November 2, 2000 in the District Court for the Eastern District of California to abate a public nuisance and to recover Lodi's costs of responding to that nuisance. The cost recovery claims were brought in the name of the "City of Lodi." The injunctive relief claims, however, were brought, at the direction of the Lodi City Council, in the name of the "People of the State of California" pursuant to Section 731.

On September 17, 2001, the People moved for a preliminary injunction against Defendant Guild Cleaners, Inc., a dry cleaning business at the center of and primarily responsible for the contamination, and Jack Alquist, the owner and operator of Guild Cleaners, Inc. (collectively, "Guild"). The People asked the District Court to order Guild to perform a comprehensive remedial investigation of the site and a time critical cleanup of one "hot spot" of contamination next to the Guild facility.

At the hearing on the motion on December 14, 2001, the District Court orally granted the People's motion for a preliminary injunction against Guild. At the District Court's request, the parties submitted further briefs on the form of the preliminary injunction, and a hearing on that issue was scheduled for January 25, 2002. However, two days before the hearing, staff legal counsel for DTSC and the California Regional Water Quality Control Board — Central Valley Region ("RWQCB") sent a letter to plaintiffs and Guild expressing their concerns about some language in the proposed injunctions, asking that they be reworded to place obligations on Guild rather than on them. That letter was forwarded to the District Court who, on January 24, 2002,

postponed the hearing on the form of the injunction and directed the parties, the authors of the letter, and a representative from the California Attorney General's Office to appear the following day, January 25, 2002. They did so.

Following that hearing, the District Court, on January 28, 2002, stayed its oral ruling granting the People's preliminary injunction motion and requested briefing on a series of "jurisdictional" questions, including "Is the State of California a party to this suit? and "If the State of California is not a party to this case, then who is the moving party in the motion for preliminary injunction and what is that party's standing to bring the motion?" The parties and the California Attorney General filed their briefs and a hearing was held on those "jurisdictional" issues on April 19, 2002.

On May 3, 2002, the District Court issued a Memorandum and Order in which it found "that the real party in interest asserting the Plaintiff People's state law nuisance claims is the City of Lodi." In that order, the court also vacated its oral ruling granting the People's preliminary injunction motion, directed the parties to file supplemental briefs "addressing the motion in the context of the City as the moving party on the state law nuisance claims," and scheduled another hearing on the motion.

On May 9, 2002, the People appealed the District Court's ruling to the Ninth Circuit Court of Appeals. Guild moved to dismiss the appeal arguing that the District Court's ruling was not immediately appealable. On September 13, 2002, the Ninth Circuit granted Guild's motion and dismissed the appeal without reaching the merits. Two weeks later, on September 27, 2002, the People moved to reinstate their appeal. The Ninth Circuit denied that motion on November 18, 2002, again without commenting on the merits of the appeal. On November 27, 2002, the People applied for an

extension of time to file this petition. On December 6, 2002, the Court granted that application and extended the deadline to Saturday, January 11, 2003.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's dismissal of the People's appeal decides an important question of federal law in a way that conflicts with other appellate court decisions.

The appealability of the District Court's real party in interest ruling is an important question of federal law. With its dismissal of the People's appeal, the Ninth Circuit decided that question in a way that conflicts with other appellate court decisions. Those decisions establish that the District Court's real party ruling is immediately appealable pursuant to the "collateral order" doctrine and because it sent a party out of court.

A. The District Court's real party in interest ruling is immediately appealable pursuant to the "collateral order" doctrine.

The "collateral order" doctrine is a practical construction of the final judgment rule that allows for immediate review of certain interlocutory orders that are collateral to, and thus do not terminate, the litigation on its merits. The doctrine treats an interim "collateral" order as if it were a final judgment, and thus appealable under 28 U.S.C. § 1291, if it: ***(1)*** conclusively determines a disputed question; ***(2)*** resolves an important question completely separate from the merits of the action; and ***(3)*** is effectively unreviewable upon appeal from a final judgment. (*Coopers & Lybrand v. Livesay,* 437 U.S. 463, 468 (1978); *Cunningham v. Gates,* 229 F.3d 1271, 1283-84 (9th Cir. 2000).)

The District Court's real party order falls squarely

within the ambit of the "collateral order" doctrine. First, it finally and conclusively determines the disputed question of, who is the real party in interest for the People of the State of California's claims brought pursuant to Section 731. The appealed order is certainly not in any way equivocal, tentative, temporary or interim in nature. Rather, it is a final and conclusive determination of a disputed question.

Second, that conclusively-resolved disputed question is important. Indeed, the question is immensely important to cities throughout California. In environmental public nuisance abatement cases, plaintiff-cities will almost always have counterclaims asserted against them and, thus, will almost always be considered potentially liable parties. The People, however, will rarely, if ever, have claims asserted against it and, therefore, will almost always be considered an equitably-innocent party. That difference is crucial to the effective prosecution on behalf of the innocent public of environmental public nuisance abatement cases.[1]

And that important disputed question is clearly separate from, and collateral to, the merits of this case. The merits of this case involve whether the defendants are liable under state public nuisance law and the other laws upon which such claims have been made. Who the real party in interest is for the People's claims certainly does not resolve any of those claims or, for that matter, any of the defenses at issue in this case. Indeed, it is not even an element of any of the

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[1] As an equitably innocent party against whom no counterclaims have been asserted, the People's ability to obtain injunctive relief and to impose joint and several liability was unquestioned. That is not necessarily so for the City of Lodi however. (*See Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 947 (9th Cir. 2002) ("[I]f the district court determines that Lodi is a PRP, Lodi may not . . . impos[e] joint and several liability on other PRPs.").)

claims or defenses at issue in this case. It is a "collateral" issue in every sense of the word.

Third, the District Court's determination that Lodi is the real party for the People's claims is, practically speaking, unreviewable upon appeal from a final judgment. Once this case reaches final judgment many years from now, there will be little, if any, reason or ability to revisit the question of who the real party is for the People's claims. A reversal of the District Court on the real party question after all of the parties' liability has already been adjudicated and allocated and the final judgment rendered will either be pointless or will require a remand to the District Court to repeat much of the proceedings.

B. The District Court's real party in interest ruling is immediately appealable because it had the practical effect of sending a party out of court.

This Court has instructed that the finality requirement of 28 U.S.C. § 1291 "should be given a practical rather than a technical construction." (*Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964).) Consistent with that instruction, the Ninth Circuit has held that "an order which effectively sends a party out of court is appealable." (*See e.g., Wakefield v. Thompson,* 177 F.3d 1160, 1162-63 (9th Cir. 1999) (dismissal of indigent *pro per* defendant's complaint with prejudice to the filing of any further unpaid complaints effectively sent him out of court and, thus, was appealable); *Ramirez v. Fox Television Station, Inc.*, 998 F.2d 743, 746-47 (9th Cir. 1993) (dismissal without prejudice based on state law preemption effectively sent plaintiff out of court and, thus, was appealable); *United States v. Lee,* 786 F.2d 951, 956 (9th Cir. 1986) (district court's denial of application for a writ of mandamus and dismissal of appeal

from magistrate's order requiring traffic offenses to be prosecuted on air bases by Air Force effectively sent the United States out of court and, thus, was appealable); *see Herrington v. County of Sonoma,* 706 F.2d 938, 939 (9th Cir. 1983) (stay of federal court proceedings pending final disposition of state court action effectively sent plaintiff out of court and, thus, was appealable).)

Here, the District Court's ruling that Lodi is the real party for the People's claims left this case with only one plaintiff — Lodi. There are, in effect, no more claims being asserted by the People; there are only claims being asserted by Lodi. The ruling, therefore, had the practical effect of sending the People out of court. (*See M&P,* 213 F. Supp. 2d at 1217 ("the City Attorney in this case has but ***one*** client — the City of Lodi" and "the City is the ***only*** real party in interest bringing this case") (emphasis added).) The District Court's real party ruling is, therefore, appealable.

II. The Ninth Circuit's dismissal of the People's appeal sanctions such a departure from the accepted and usual course of judicial proceedings by the District Court as to call for an exercise of this Court's supervisory power.

The District Court's ruling is so clearly erroneous and so incredibly wasteful of the parties' and the District Court's limited resources and so disruptive of the case in the District Court, that this Court should exercise its supervisory power by either summarily reversing the ruling itself or remanding the matter to the Ninth Circuit to do so.

A. The People's public nuisance abatement claims are being prosecuted in the name of the real party in interest, the People of the State of California, in compliance with Rule 17(a).

The authority of federal district courts to insist that plaintiffs be real parties in interest derives from Rule 17(a). Apart from listing statutory plaintiffs and several other examples of real parties in interest, Rule 17(a) does not otherwise define the term "real party in interest." (*See U-Haul Int'l, Inc. v. Jartran, Inc.*, 793 F.2d 1034, 1038 (9th Cir. 1986).) That task fell to the courts, and the widely-accepted definition of a "real party in interest" that the courts developed is "any party to whom the relevant substantive law grants a cause of action." (*See e.g., U-Haul,* 793 F.2d at 1038.) The "relevant substantive law" is the federal or state law that created the substantive right being asserted by the plaintiff. (*In re Davis,* 194 F.3d 570, 578 (5th Cir. 1999).)

1. As a "party to whom the relevant substantive law grants a cause of action" to abate a public nuisance, the People of the State of California is the real party in interest for the People's public nuisance abatement claims in this case.

Here, the "relevant substantive law" is state law since the causes of action at issue, abatement of a public nuisance and a public nuisance *per se,* are the product of state law. (Cal. Civ. Code §§ 3479-80, 3491, 3494; Cal. Civ. Proc. Code § 731.) As such, the Court must ask whether the substantive law of the State of California grants such causes of action to the People of the State of California. It surely does.

Under the state's substantive law, the People clearly possess the right to seek and secure judicial abatement of public nuisances located within the geographic boundaries of the state. That right exists as an incident to the People's sovereignty. The inherent right of a sovereign to maintain a cause of action to abate a public nuisance exists because ***public*** nuisances are, by definition, matters of ***public*** concern, and thus implicate the sovereign's most fundamental of governmental powers — the power to protect the ***public*** health, welfare, safety, and the environment, often referred to as the "police" power. (*See e.g., Nguyen v. Superior Court,* 49 Cal. App. 4th 1781, 1787 (1996); *B.C. Cotton, Inc. v. Voss,* 33 Cal. App. 4th 929, 957 (1995).) Indeed, the California Supreme Court stated over 100 years ago that "[t]he authority . . . to institute and maintain [public nuisance abatement] actions . . . in the name of the people of the state has been so often passed upon and upheld it would seem idle to now question it." (*People ex rel. Robarts v. Beaudry,* 91 Cal. 213, 215, 220-21 (1891).) In addition, the People's right to maintain a cause of action to abate the particular kind of public nuisance at issue here, one affecting the groundwater, also exists because the People own the groundwater. (*See* Cal. Wat. Code § 102.) Since it is a "party to whom the relevant substantive law grants a cause of action" to abate a public nuisance, the People of the State of California is, therefore, the real party for the People's public nuisance claims here.

2. As "a party authorized by statute" to sue in its own name, the People of the State of California is the real party in interest for the People's public nuisance abatement claims in this case.

In addition to having an inherent governmental and property right to maintain an action for judicial abatement of

a public nuisance in their own name, the People also are explicitly authorized by statute to do so. It will be recalled that Rule 17(a) provides that "a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought." Statutory plaintiffs (*i.e.*, parties authorized by statute to sue) are, by definition, real parties in interest.

Case law supports the proposition that statutory plaintiffs are proper party plaintiffs and real parties in interest. *People v. Steelcase, Inc.*, 792 F. Supp. 84 (C.D. Cal. 1992) is a particularly relevant example. In *Steelcase*, the defendant challenged the People of the State of California's status as a real party in interest under Rule 17(a) in an unfair competition case. The District Court for the Central District of California responded, "[California's] unfair competition statute expressly authorizes the action to be prosecuted in the name of the People. . . . Thus, . . . the People is the proper plaintiff and the real party in interest." (*Id.*, at 85-86.) Thus, the court in *Steelcase* made it clear that, when a statute expressly authorizes an action to be prosecuted in the name of the People of the State of California, then the People of the State of California is a statutory plaintiff and, therefore, a real party in interest pursuant to Rule 17(a). (*Id.*)

That is precisely the same situation that exists in the present case. Numerous statutes expressly authorize public nuisance abatement actions to be prosecuted in the name of the People of the State of California, including Section 731, which, it will be recalled, provides that "[a] civil action may be brought in the name of the people of the State of California

to abate a public nuisance. . . ."[2] Given Section 731, it cannot seriously be doubted that the People of the State of California is a party authorized by statute to sue in its own name to abate a public nuisance. And as a statutory plaintiff, it is, consistent with Rule 17(a), a proper party plaintiff and a real party in interest for the public nuisance abatement claims it has asserted in this case. (*See Steelcase,* 792 F. Supp. at 85-86)[3]

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[2] For other statutes that authorize public nuisance abatement actions to be brought in the name of the People of the State of California, *see e.g.*, Cal. Gov. Code §§ 12607, 26528; Cal. Civ. Code § 798.87; Cal. Health & Safety Code § 18402; Cal. Food & Agric. Code §§ 12643, 27601; Cal. Public Resources Code § 4180; Cal. Street & Highways Code § 723; Cal. Water Code §§ 8608, 8709, 8719.

[3] It will be noted that the focus of the real party in interest analysis is on the plaintiff, not the plaintiff's attorney. Any concerns that the District Court may have had about the Lodi City Attorney's authority to involve the People in this case as a party plaintiff and to represent the People in court (*see e.g., M&P,* 213 F. Supp. 2d at 1211, 1216) are entirely separate from the real party in interest question and, it might be added, are quickly put to rest by reference to Section 731 and California Civil Code § 3494. (*See e.g., People ex rel. Cooper v. Mitchell Brothers' Santa Ana Theater,* 165 Cal. App. 3d 378, 386 (1985) ("[T]his action was a nuisance abatement action brought by the city attorney in the name of the People of the State of California. The city attorney is one of the officers authorized by law to abate a public nuisance. Civ. Code § 3494; Code Civ. Proc. § 731.").) Case law aptly illustrates the distinction between these two separate issues. In *State ex rel. Murray v. Pure Oil Co.*, 169 Okla. 507, 37 P.2d 608 (1934), for instance, the Governor of Oklahoma brought an action in the name of the State of Oklahoma to recover the assets of an insolvent bank. The Supreme Court of Oklahoma held that the State of Oklahoma

B. The District Court's interpretation of the term "People of the State of California" to mean the people of the City of Lodi was clearly erroneous.

Having shown that the People's public nuisance abatement claims here were being prosecuted in the name of the real party, the People of the State of California, consistent with Rule 17(a), the next question is, who is the "People of the State of California"? The District Court found that the term refers, for purposes of this case, to only those people residing within the City of Lodi.[4]

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was a proper party plaintiff pursuant to statute, but that the Governor lacked authority to institute the action:

> The precise question involved is, what officer or officers have the power to involve the state of Oklahoma in this litigation as a party plaintiff, and not whether the state of Oklahoma is a proper party plaintiff. . . . Since the state is the proper party plaintiff by virtue of . . . statute, it may maintain the action, regardless of whether it is the real party in interest. . . . An action may be maintained by one expressly authorized by statute, even though that person is not in fact the real party in interest. . . . [However] [t]he statute . . . which authorizes the state to be a party plaintiff names the bank commissioner as the proper officer to institute legal actions. . . . It follows that the bank commissioner and not the Governor is the proper person to [bring] . . . this case. [*Id.*, at 609-12.]

[4] "CCP § 731 permits a city attorney to bring an action to abate a public nuisance *under state law* "in the name of the people of the State of California." The question presented here, however, is who is the plaintiff "People of the State of California?" Is it a party

This is an issue of statutory interpretation and, as such, the analysis must begin with California's rules of statutory construction. (*See In re Reaves,* 285 F.3d 1152, 1155-56 (9th Cir. 2002).) "The goal of statutory construction is to ascertain and effectuate the intent of the Legislature. Ordinarily, the words of the statute provide the most reliable indication of legislative intent." (*People v. Jefferson,* 21 Cal. 4th 86, 94 (1999) (citations omitted); *see also* Cal. Civ. Proc. Code § 1859.) As such, the first step is to turn to the language of the statute itself, reading it as a whole and giving its words their usual, ordinary and commonsense meanings. (*People v. Edmonton,* 103 Cal. App. 4th 557, 565 (2002); *see also* Cal. Civ. Proc. Code §§ 16, 1858.) "If the terms of the statute are unambiguous, [courts] presume the lawmakers meant what they said, and the plain meaning of the language governs" (*Estate of Griswold,* 25 Cal. 4th 904, 911 (2001)) and "[courts] need not resort to other construction aids" (*Rojas v. Superior Court,* 102 Cal. App. 4th 1062, 1073 (2002)). "In such cases, there is nothing to interpret or construe. But if the meaning of the words is not clear, [courts] take the second step and refer to the legislative history. The final step, which is to be taken only when the first two steps have failed to reveal clear meaning, is to apply reason, practicality, and common sense to the statutory

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separate and distinct from the City itself? . . . [T]here is no rational support for the Plaintiff People's proposition . . . that under CCP § 731 a city attorney represents the "People of California" as a separate party plaintiff apart from the co-plaintiff City. . . . [T]he reference to "the people of California" . . . must be delimited. . . . [T]he residents of Lodi . . . constitute the City of Lodi. . . . [W]hen suit is brought under CCP § 731 "in the name of the people of the State of California," . . . the plaintiff is the city which the city attorney represents. . . . (*M&P,* 213 F. Supp. 2d at 1212, 1216.)

language." (*Edmonton,* 103 Cal. App. 4th at 565.) When applying these rules, courts should be mindful that their "role is limited; [they] do not question the wisdom, expediency, or policy of legislation." (*California Teachers Assoc. v. Governing Bd. of Rialto Unified School Dist.,* 14 Cal. 4th 627, 632-33 (1997).) "In the construction of a statute . . . the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what is omitted, or to omit what has been inserted." (Cal. Civ. Code § 1858.)

1. The plain meaning of the term "People of the State of California" is all of the citizens residing within the state, not as individuals, but as a single collective political entity within which resides the state's sovereignty.

As noted, the first step in the process of statutory construction is to turn to the language of the statute itself, giving the words their "usual, ordinary and commonsense meanings." Here, the "usual, ordinary and commonsense" meaning of the term "People of the State of California" is all of the citizens residing within the State of California, not as disparate individuals, but as a single collective political entity within which the sovereignty of the state resides. That interpretation is reflected in numerous statutes. For example, California Government Code § 240 provides: "The people, as a political body, consist of: [¶] (a) Citizens who are electors. [¶] (b) Citizens not electors." California Government Code § 241, in turn, defines "citizens": "The citizens of the State are: [¶] (a) All persons born in the State and residing in it. . . . [¶] (b) All persons . . . who are citizens of the United States and residing within the State." Along the same lines is California Government Code § 100, which provides: "(a) The sovereignty of the state resides in the people thereof, and all writs and processes shall issue in

their name. [¶] (b) The style of all process shall be 'The People of the State of California,' and all prosecutions shall be conducted in their name and by their authority." (*See also* Cal. Const., Art. 2, § 1 ("All political power is inherent in the people.").) Indeed, all of the many hundreds of statutes that use the term "People of the State of California" are consistent with that interpretation.

Case law also reflects the same understanding of the term "People of the State of California" as a single political body consisting of all the people. For instance, in describing a district attorney's representation of the People in a criminal matter, the California Supreme Court in *People v. Eubanks,* 14 Cal. 4th 580 (1997) recently said, "The public prosecutor is the representative not of any ordinary party to a controversy, but of a sovereignty. . . . [T]he prosecutor's role [is] as representative of the People as a body, rather than as individuals. The prosecutor speaks . . . for all the People." (*Id.,* at 589-90 (internal quotation marks and citations omitted).)

And, finally, legal commentators also understand and use the term "the People" to mean all of the citizens of a particular sovereignty, not as separate individuals, but as a single collective political entity:

> In our system, the term "the people" means a body politic, a corporate unit forming a compact organized society, and acting as a political entity by and through representatives, who constitute, for the time being, the public authority to whom is confided the duty of carrying out the sovereign will of the society, either in making, executing or construing the rules and regulations comprehensively termed laws. The sovereignty when traced to its

> source must be found in the people. Political powers are in the people and remain there except as delegated by the constitution or statute. The preamble of the Constitution refers to "the people of the United States." The Constitution speaks of "The citizens of each state," and "of citizens of the several states." . . . Under our form of government, therefore, the repository of ultimate sovereignty is in the people, not as so many disparate individuals but in their political capacity only. "The people," therefore, in political and legal theory, are the supreme law-givers, law-interpreters, and law-administrators. In them resides the law-making, law-interpreting and law-enforcing power. [1 McQuillin, *The Law of Municipal Corporations* § 1.44 (2002) (citations omitted).]

Based on the authorities set forth above, it is clear that the plain, long-standing and well-accepted meaning of the term the "People of the State of California" is all of the citizens residing in the state, not as separate individuals, but as a single collective political sovereign.

2. The term "People of the State of California" is not ambiguous since it is not susceptible to more than one reasonable interpretation and, therefore, its plain meaning controls without resort to other construction aids.

Once the plain meaning of a statute is ascertained, a court must next determine whether it is ambiguous. A statute is ambiguous only if it is susceptible to more than one reasonable interpretation. (*Rojas v. Superior Court,* 102 Cal.

App. 4th 1062, 1073 (2002).) If it is not ambiguous, then the court must presume that the lawmakers meant what they said, and the plain meaning of the language controls; other construction aids are not used. (*Estate of Griswold,* 25 Cal. 4th 904, 911 (2001).) Here, the term "People of the State of California" is not ambiguous. The term cannot reasonably be given the meaning that the District Court gave to it in this case (*i.e.*, only those people residing within the City of Lodi). (*M&P,* 213 F. Supp. 2d at 1216-17.) Besides being inconsistent with the plain meaning of the term, there are many other reasons why such an interpretation is simply not reasonable.

a. The District Court's interpretation of the term "People of the State of California" to mean the people of the City of Lodi violates the rule that identical words in different statutes should be construed as having the same meaning.

Such an interpretation would violate the general rule of statutory construction that provides that "identical words in different statutes relating to the same subject matter are construed as having the same meaning." (*County of Ventura v. Gonzales,* 88 Cal. App. 4th 1120, 1124 (2001).) When a city attorney brings a public nuisance abatement action in the name of the People pursuant to Section 731, the term "People" would mean only those people within the city that the city attorney represents. However, when such an action is brought by the Attorney General or some other ***state*** official, department, or agency pursuant to statute (*see e.g.*, Cal. Gov. Code § 12607), the term "People" would mean all of the people of the state. And, when such an action is brought by a district attorney, a county counsel, or some other local or regional public official or agency pursuant to statute (*see e.g.*, Cal. Gov. Code § 26528), the term "People" would

mean only those people within that locality.[5]

In fact, there are dozens, if not hundreds, of statutes that authorize a wide variety of ***local*** public officials and entities[6] and, in a few situations, private citizens[7] to bring a

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[5] Given the real party requirement's focus on the plaintiff, not the plaintiff's attorney, it seems a rather bizarre notion that the real party in interest for the very same claim to abate the very same public nuisance in the name of the very same party should change depending on who happens to be acting as that party's attorney. (*See* footnote 3, *supra.*) "Where the language of a statute is reasonably susceptible of two constructions, one of which in application will render it reasonable, fair and harmonious with its manifest purpose, and another which would be productive of absurd consequences, the former construction will be adopted." (*Nguyen v. Superior Court,* 49 Cal. App. 4th 1781, 1787 (1996) (internal quotation marks omitted).)

[6] *See e.g.,* Cal. Civ. Proc. Code § 731; Cal. Gov. Code §§ 8670.58, 26506, 26528; Cal. Civ. Code §§ 52(d), 52.1(a), 56.36(e), 798.87(c), 1716(h), 1725(f), 1745.5(b), 1747.8(f), 1789.5(a), 1799.3(d), 1812.33(b); Cal. Health & Safety Code §§ 18402, 25182, 25249.7(d), 25299.02, 25422(b), 25516.1, 104550(h), 116840(c), 122110(a), 122150(a), 43154; Cal. Food & Agric. Code §§ 12643, 27601; Cal. Pub. Resources Code §§ 25966, 25967(a); Cal. Educ. Code § 66451(b); Cal. Pub. Util. Code § 7721; Cal. Rev. & Tax Code § 3441; Cal. Fish & Game Code § 5650.1(d); Cal. Labor Code § 1309.6(a); Cal. Penal Code §§ 653.59, 11201, 11226; Cal. Bus. & Prof. Code §§ 2064.2, 2453(j), 7502.1(c), 7502.2(c), 7502.6(b), 7523(c), 7523.5(d), 7582.3(c), 7582.4(d), 17204, 17206(a), 17207(b), 17535, 17535.5(b), 17536(a), 19214, 22500(c).

[7] *See e.g.,* Cal. Gov. Code § 12652(c) (authorizing private parties to bring *qui tam* proceedings in name of state); *People v. Petroleum Rectifying Co.,* 21 Cal. App. 2d 289 (1937) (*quo warranto*

whole host of different kinds of actions in the name of the People. It is not at all clear, for example, who, according to the District Court's reasoning, the real party would be for a *qui tam* or *quo warranto* proceeding brought by a private citizen in the name of the People or the State since private citizens and their private attorneys are not state or local public officials; in fact, they don't have political constituencies at all.

b. The District Court's interpretation of the term "People of the State of California" to mean the people of the City of Lodi gives the term two different meanings within the same statute.

The District Court's interpretation of the term "People" also gives that term two different meanings within the very same statute. When a public nuisance abatement action is brought in the name of the People by a city attorney under Section 731, the term "People" would mean the residents of the city that the city attorney represents. But when the very same action under the very same statute is brought by a district attorney, the term would mean the residents of the county that the district attorney represents.

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proceeding brought by private party in name of People); *cf.* 31 U.S.C. § 3730(b)(1) (authorizing private parties to bring *qui tam* proceedings in name of United States); *United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1217, n.18 (9th Cir. 1996) (United States is real party in *qui tam* action brought by private party in name of United States).

c. The District Court's interpretation of the term "People of the State of California" to mean the people of the City of Lodi violates the rule that words in a statute should be given useful effect.

The District Court's interpretation of the term "People of the State of California" also violates the rule of statutory construction that provides that "every word and phrase employed [in a statute] is presumed to be intended to have meaning and perform a useful function . . . [and] a construction rendering some words in the statute useless or redundant is to be avoided." (*People v. Contreras,* 55 Cal. App. 4th 760, 764 (1997).) City attorneys have long had the authority to bring public nuisance abatement actions in the name of the cities they represent. That authority neither derives from, nor was taken away by, Section 731. (*See People ex rel. Clancy v. Superior Court,* 39 Cal. 3d 740, 750, n.5 (1986); *City and County of San Francisco v. Buckman,* 111 Cal. 25, 30-31 (1896); *County of Sierra v. Butler,* 136 Cal. 547, 548-51 (1902).) As such, the District Court's interpretation of the term "People" to mean city renders Section 731 ineffectual. Put simply, the District Court read Section 731 as giving city attorneys that which they already had.

d. The District Court's interpretation of the term "People of the State of California" to mean the people of the City of Lodi conflicts with the requirement that actions be prosecuted "in the name" of the real party in interest.

The District Court's interpretation of the term "People of the State of California" to mean the people of the City of Lodi also conflicts with Rule 17(a)'s requirement that actions

be prosecuted "in the name" of the real party in interest. An action cannot logically be prosecuted in the name of the People and, at the same time, be prosecuted in the name of the real party if, as the District Court held, the People is not the real party. In order to comply with the requirement that actions be prosecuted in the name of the real party, Lodi should be substituted in for the People in the caption of this case. But that, of course, would render meaningless the grant of authority, in Section 731, to local public prosecutors to sue in the name of the People.

3. Even if the term "People of the State of California" were ambiguous, there is no reasonable basis in this case for interpreting it to mean the people of the City of Lodi.

Even if the term "People of the State of California" were susceptible to more than one reasonable interpretation (that is, if it were ambiguous), there is still no reasonable basis for interpreting it in this case to mean the people of the City of Lodi. In adopting that interpretation, the District Court relied on several findings (*M&P,* 213 F. Supp. 2d at 1214-17), each of which will be discussed in turn and shown to be either inaccurate or simply inadequate to support the court's interpretation. But first, a brief word about the legislative history of Section 731 is in order.

a. The legislative history of Section 731 does not reflect that the Legislature intended the term "People of the State of California" to be limited to the people within the territorial jurisdiction of the governmental attorney representing the People.

It will be recalled that the second step in the process of statutory construction, after determining that a statute is ambiguous, is to refer to the statute's legislative history.

(*People v. Edmonton,* 103 Cal. App. 4th 557, 565 (2002).) The People's counsel have done that and found nothing to support the District Court's interpretation of the statute at issue here. The legislative history of Section 731 does not reflect that the Legislature intended the term "People of the State of California" to be limited to the people within the territorial jurisdiction of the governmental attorney who happens to be representing the People in a particular case.

b. When a local government attorney represents the "People of the State of California," he or she represents all of the people within the state.

Arguably, the most significant finding that the District Court relied upon to support its unique interpretation of Section 731 was its finding that, when local government attorneys represent the People, they only represent the people residing within their local jurisdiction, not all of the people residing within the state.[8]

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[8] "[T]he Attorney General['s] . . . analysis of CCP § 731 yields a more rational result [than the City's analysis]. . . . [T]he Attorney General contends that the geographical boundaries of the city represent the jurisdictional limits of a city attorney; therefore, a city attorney cannot represent . . . the "people of the State" as a separate party apart from the city. . . . While there is no case law (perhaps understandably) directly addressing this issue, certain cases are instructive. . . . *People v. City of Los Angeles* . . . suggests that even when a city attorney files suit "in the name of the people of the State of California" under CCP § 731, he represents *only* the interests of the city he serves, not the State. . . . *Hy-Lond* . . . indicate[s] . . . that a city attorney's authority is limited to the geographical boundaries of the constituency which he or she represents." (*M&P,* 213 F. Supp. 2d at 1214-16.)

However, case law clearly holds that, when a local government attorney maintains an action in the name of the "People of the State of California," he or she represents all of the people in the state, not just those residing within his or her local jurisdiction. For instance, it is of course true that, when a district attorney or city attorney prosecutes a ***criminal*** case in the name of the "People of the State of California," he or she represents all of the people of the state, not just those within the county or city he or she represents. (*See e.g., People v. Eubanks,* 14 Cal. 4th 580, 589-90 (1997) ("The prosecutor speaks . . . for all the People."); *see also Pitts v. County of Kern,* 17 Cal. 4th 340 (1998) (when preparing to prosecute and when prosecuting criminal violations of state law in the name of the People, a district attorney represents the state and not his county).)

But it is also true that, when a district attorney, city attorney, county counsel or other local government attorney brings a ***civil*** action in the name of the People pursuant to statute, he or she represents all of the people residing within the state, not just those people residing within his or her local territorial jurisdiction. That point was aptly illustrated by a previously mentioned case, *People v. Steelcase, Inc.,* 792 F. Supp. 84 (C.D. Cal. 1992). It will be recalled that *Steelcase* was a civil unfair business practices case brought by a district attorney in the name of the People. The defendant argued that the county, not the People, was the real party pursuant to Rule 17(a). The district court disagreed, "Defendant . . . contends that . . . the real party in interest is the County. . . . Defendant argues that although the action is purportedly brought in the name of the People . . . a district attorney is authorized to prosecute civil actions only on behalf of the county or public agencies located within the county. . . . [D]efendant . . . fails to mention that the unfair competition statute expressly authorizes this action to be prosecuted in the

name of the People. . . . Thus . . . the People is the proper plaintiff and the real party in interest. (*Steelcase,* 792 F. Supp. at 85-86.)[9]

Neither *People v. Hy-Lond Enterprises, Inc.*, 93 Cal. App. 3d 734 (1979) nor *People v. City of Los Angeles,* 160 Cal. App. 2d 494 (1958),which were so heavily relied upon

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[9] To similar effect is *Nguyen v. Superior Court,* 49 Cal. App. 4th 1781 (1996). In that case, a district attorney brought a civil "red light" public nuisance abatement suit in the name of the People. The defendants moved to transfer the action to another county on the ground that the district attorney represented the county, not the state. The trial court denied the motion, and the appellate court upheld the trial court. "We find the District Attorney . . . represents the People of the State of California in a red light abatement action. . . . [Defendants] . . . contend the district attorney acted on behalf of the county because an abatement lawsuit is civil, not criminal, and all the declarations submitted in support of the preliminary injunction came from city and county employees, not state employees. . . . [However] [a] red light abatement action "is prosecuted in the name of the People of the state, as are criminal prosecutions, which indicates that the county as such is not as much concerned as the People of the state." Like a criminal prosecution, the evidence and investigation may be local in character. Thus, it makes no difference that . . . County and city employees made the declarations submitted in support of the preliminary injunction. . . . More significant factors are the relationship between red light abatement actions and criminal prosecutions, the state's interest in abating nuisances, and the statute's language specifying the district attorney acts on behalf of the People. . . . When district attorneys file a complaint pursuant to the Red Light Abatement Act, they act on behalf of the People of the State of California." (*Nguyen,* 49 Cal. App. 4th at 1784-89, 1792 (citations omitted).)

by the District Court, undercut the conclusion that, when local government attorneys bring actions in the name of the People, they represent all of the people of the state (the state sovereign). In *People v. City of Los Angeles,* 160 Cal. App. 2d 494 (1978), the court simply held that Section 731 does not authorize a city attorney to enforce a judgment obtained by the Attorney General in a prior action in which the city was not a party and the city attorney did not participate. (*Id.*, at 500.) And in *People v. Hy-Lond Enterprises, Inc.*, 93 Cal. App. 3d 734 (1979), a district attorney filed suit in the name of the People against a corporation that operated several nursing homes in the state, and then submitted a stipulated judgment settling the matter. However, the stipulated judgment covered the defendant's nursing homes outside of the district attorney's county and restrained the type of enforcement actions that could be brought against those facilities by state agencies (who had not consented to such restraint). The court vacated the stipulated judgment, holding that the grant of authority to sue in the name of the People does not include the authority to restrain the powers of other public officials and agencies at sites outside of the prosecuting district attorney's county. (*Id.*, at 740-43, 747-51.)

c. The Attorney General can intervene in this action in the District Court as co-counsel for the People if he so chooses, but he cannot veto the Lodi City Attorney's concurrent statutory authority to represent the People with respect to the abatement of a public nuisance within the City of Lodi.

The District Court also cited, as support for its unique interpretation of the term "People of the State of California," the fact that the California Attorney General had objected to

the Lodi City Attorney's attempt, in this case, to represent all of the people residing within the state.[10]

The Attorney General may intervene "in any judicial or administrative proceeding in which facts are alleged concerning pollution or adverse environmental effects which could affect the public generally." (Cal. Gov. Code § 12606.) To facilitate intervention, any party to an action "for relief of any nature other than solely for money damages," who files a pleading that alleges "facts or issues concerning alleged pollution or adverse environmental effects which could affect the public generally," is required to furnish a copy of that pleading to the Attorney General within ten days of filing. (Cal. Civ. Proc. Code § 388.)

The Lodi City Attorney, who has never contended that he represents any "state agency," timely furnished the Attorney General with copies of the plaintiffs' Complaint and First Amended Complaint in this action. The Attorney General has thus far chosen not to intervene in this action. He can still do so. The Legislature gave him that right. The Legislature did not, however, give him the right to unilaterally veto the Lodi City Attorney's representation of the People for the purpose of abating a public nuisance existing wholly within Lodi. Nor did the Legislature require the Lodi City Attorney to obtain his consent to represent the People for such purpose.

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[10] "[T]he elected Governor and Attorney General have decided not to exercise their authority, and, expressly oppose the City Attorney's assumption of such authority. . . . [A]bsent the Attorney General's consent, a city attorney cannot act as the legal counsel of any state agency." (*M&P*, 213 F. Supp. 2d at 1214.)

d. The term "People of the State of California" should be interpreted to mean all of the people residing within the state (*i.e.*, the state sovereign) because such an interpretation would have a preclusive effect on other government entities, and that serves the purpose of the real party in interest requirement.

In support of its finding that the City of Lodi is the real party in interest for the People's public nuisance abatement claims in this case, the District Court cited the fact that a contrary finding could have a preclusive effect on the State of California and other local prosecutors.[11]

However, that fact actually undercuts the District Court's ruling. The purpose of the real party in interest requirement is to ensure that judgments will be entitled to *res judicata* effect, thus saving defendants from further harassment or vexation at the hand of some other claimant to the same demand. (*See e.g., Pacific Coast Agric. Export Association v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1208 (9th Cir. 1975); *Intown Properties Mgmt., Inc. v. Wheaton Van Lines, Inc.*, 271 F.3d 164, 170 (4th Cir. 2001).) That purpose is best served here by interpreting the term "People of the State of California" to mean the state sovereign so that the final judgment in this case will have its proper *res judicata*

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[11] "[W]ere the court to find that the City Attorney of Lodi represents [all] "the people of California," the injunction sought in this case may well have preclusive effect on the State of California, including state agencies and state prosecutors, and other local prosecutors who likewise have the statutory authority to bring actions "in the name of the People." Clearly, no fair reading of CCP § 731 would support such a chaotic result." (*M&P*, 213 F. Supp. 2d at 1217 (citation omitted).)

effect and protect the defendants from further claims by other state and local public officials and agencies.[12]

CONCLUSION

For the reasons set forth above, the People respectfully request that this Court grant their Petition for Writ of Certiorari and either summarily reverse the District Court's real party in interest ruling or remand the matter to the Ninth Circuit with directions to do so.

Respectfully submitted,

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[12] The Defendants here are obviously using the real party requirement for an entirely different purpose — to try to avoid being held jointly and severally liable. (*See* footnote 1, *supra.*)

APPENDIX A

IN THE UNITED STATES DISTRICT COURT OF APPEALS FOR THE NINTH CIRCUIT

[Filed November 18, 2002]

No. 02-15968
D.C. No. CV-00-02441-FCD

People of the State of CALIFORNIA,
Plaintiff - Appellant,

and

CITY OF LODI,
Plaintiff,

v.

M & P INVESTMENTS, et al.,
Defendants - Appellees

and

PAUL MARIANI, an individual, et al.,
Third-party-defendants - Appellees,

and

CALIFORNIA ATTORNEY GENERAL; et al.,
Amicus Curiae - Appellees

ORDER

Before: PREGERSON, ALARCON, and WARDLAW, Circuit Judges.

The motion to reinstate is construed as a motion for reconsideration of this court's September 13, 2002 order, So construed, it is denied. *See* 9th Cir. R. 27-10.

To the extent that appellees' "Objections to Defective Service" requests that this court reject the motion to reinstate as untimely or impose sanctions on appellant, the request is denied.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT OF APPEALS FOR THE NINTH CIRCUIT

[Filed September 13, 2002]

No. 02-15968
D.C. No. CV-00-02441-FCD

People of the State of CALIFORNIA,
Plaintiff - Appellant,

and

CITY OF LODI,
Plaintiff,

v.

M & P INVESTMENTS, et al.,
Defendants - Appellees

and

PAUL MARIANI, an individual, et al.,
Third-party-defendants - Appellees,

and

CALIFORNIA ATTORNEY GENERAL; et al.,
Amicus Curiae - Appellees

ORDER

Before: PREGERSON, ALARCON, and WARDLAW, Circuit Judges.

Appellees' motion to dismiss this appeal is granted.

DISMISSED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

[Filed May 3, 2002]

No. CIV. S-00-2441 FCD/J

People of the State of CALIFORNIA, and City of Lodi, California,
Plaintiffs,

v.

M & P INVESTMENTS, a California Partnership, et al.,
Defendants.

And Related Cross-Claims, Counterclaims, Third Party Claims and Fourth Party Claims.

MEMORANDUM AND ORDER

DAMRELL, District Judge.

On April 19, 2002, the court held a hearing on the various jurisdictional and other issues presented by the court's

January 28, 2002 order. In light of the granting of plaintiff People of the State of California's (the "Plaintiff People") motion to dismiss the Resource Conservation and Recovery Act ("RCRA") claim, many of the issues presented in the January 28 order are now moot. Accordingly, this order addresses only those issues unaffected by the motion to dismiss. The resolution of these issues, however, will have a significant impact on this case.

BACKGROUND

While this case was filed in November 2000, the starting point of the litigation particularly relevant to this hearing began in May 2001. At that time, the Plaintiff People and co-plaintiff City of Lodi (the "City") (sometimes collectively referred to herein as "plaintiffs") filed a motion to dismiss the first amended counterclaim of defendants Guild Cleaners, Inc. and Jack Alquist (collectively, "Guild"), which included Guild's claim under RCRA against the City. On June 19, 2001, the court granted the motion, in part, finding (among other things) that Guild's RCRA counterclaim against the City under § 7002(a)(1)(B) was barred because the State of California (i.e., the Plaintiff People) was diligently prosecuting this action.

Also in June 2001, plaintiffs filed a motion for docket preference, seeking to schedule this case in an expedited fashion due to the nature of the Plaintiff People's claims (particularly, abatement of a *public* nuisance). Ultimately, the court scheduled the case on its own timetable, and denied

plaintiffs' motion as moot. *See* Pretrial Scheduling Order, filed Sept. 26, 2001.

Thereafter, in August of 2001, the City issued a "time critical abatement action order" ("AAO"), pursuant to a provision of the City's municipal law (referred to as "MERLO") against certain defendants in an effort to force the named defendants to engage in an immediate investigation and remediation of the Lodi Area of Contamination.[1] Defendants brought a motion to stay enforcement of the AAO, which the court granted on August 28, 2001. Mem. & Order, filed Aug. 28, 2001. The court held that the AAO contravened the jurisdiction of the court, and under the All Writs Act its enforcement was properly stayed.[2]

Shortly after that decision, the Plaintiff People filed, in September 2001, an application for a temporary restraining order ("TRO") against Guild[3] seeking the same relief requested in the AAO. The court denied the application for a

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[1] Said Area is defined in plaintiffs' First Amended Complaint, filed May 25, 2001.

[2] Plaintiffs appealed this decision, and the matter is currently pending before the Ninth Circuit. *See* Ex. A to Req. for Jud. Not. filed in Supp. of Pl. People's Reply on Mot. to Dismiss, filed April 12, 2002.

[3] The motion was also filed against the Estate of Dwight Alquist, deceased who is also sometimes referred to herein collectively as "Guild."

TRO finding that the Plaintiff People had unjustifiably delayed bringing the request for a TRO. Mem. & Order, filed Sept. 6, 2001. The Plaintiff People then filed a motion for preliminary injunction against Guild. That motion was extensively briefed by the parties between September 2001 and December 2001. During the course of those proceedings and with the parties' consent, the court appointed an expert to assist the court in reviewing the technical issues presented by the motion.

Also in September, defendant Odd Fellows Hall Association of Lodi, Inc. ("Odd Fellows") filed a motion to disqualify plaintiffs' counsel from simultaneously representing the Plaintiff People and the City. Odd Fellows argued that such representation presented a conflict of interest because the City Attorney of Lodi cannot represent the City, a party alleged to be responsible for the public nuisance condition, while at the same time represent the Plaintiff People, who is suppose to be the neutral, public prosecutor of the alleged harm. In other words, the interests of the City in avoiding liability for the cleanup of the nuisance are directly at odds with the interests the City Attorney seeks to vindicate in the name of the People, namely the prosecution of those allegedly responsible for the contamination. Without reaching the merits of the purported conflict, the court denied Odd Fellows' motion on the ground that as a third-party (Odd Fellows was neither a former or current client of plaintiffs' counsel), it lacked standing to assert a conflict of interest. Mem. & Order, filed Nov. 13, 2001.

On November 26, 2001 the court held a tutorial with the court expert and the parties regarding the technical issues involved in the motion for preliminary injunction. The court's expert, Dr. Michael Kavanaugh, and the parties' various consultants gave presentations and were questioned by the court and each other. Significantly, Megan Cambridge of the California Department of Toxic Substances Control ("DTSC") appeared, gave testimony, and questioned the various presenters.

The hearing on the motion for preliminary injunction took place on December 14, 2001. At the hearing, the court orally ruled that the Plaintiff People was entitled to a preliminary injunction against Guild under RCRA and state law. One of the primary bases for the ruling was the court's treatment of the Plaintiff People as an "innocent" party, in that no claims were asserted against the Plaintiff People. The court indicted that it would issue its written order regarding entitlement to an injunction forthwith. However, the court requested further briefing on the form of the proposed preliminary injunction. A further hearing on that issue was scheduled for January 25, 2002.

Then, on January 23, 2002, staff legal counsel for the DTSC and the Regional Water Quality Control Board ("RWQCB") (collectively, the "State Agencies")[4] sent a letter to plaintiffs and Guild asserting the State Agencies'

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[4] Said State Agencies operate under the authority of the Governor of the State of California.

position that the court did not have jurisdiction over the agencies.[5] At the request of the State Agencies, the letter was transmitted to the court.

In light of the letter, on January 24, 2002, the court continued the hearing on the form of the injunction and directed the parties to appear on January 25 to discuss the jurisdictional implications of the State Agencies' letter. Mem. & Order, filed Jan. 24, 2002. The court specifically ordered the authors of the letter to appear, as well as a representative of the Attorney General's office. They did so. Following the hearing, the court issued an order requiring the parties[6] to respond to a series of questions:

> (1) Is the State of California a party to this suit?
>
> (2) Does California Code of Civil Procedure § 731 authorize a City Attorney to bring an action in federal court on behalf of the State of California? Specifically, does it

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[5] Both the Plaintiff People and Guild's proposed preliminary injunctions contemplated the DTSC serving as the lead enforcement agency supervising compliance with the injunction.

[6] At the hearing, the Attorney General's Office and the State Agencies (sometimes collectively referred to herein as the "Attorney General") agreed to file amicus curiae briefs. They filed a joint brief on March 12, 2002.

authorize a City Attorney to bring such a suit under the Resource Conservation and Recovery Act of 1976 ("RCRA") § 7002 (42 U.S.C. § 6972)?

(3) If California Code of Civil Procedure § 731 authorizes the City Attorney of Lodi to bring an action on behalf of the People of the State of California, has the State consented to federal jurisdiction when suit is brought in federal court in the name of the "People of the State of California?"

(4) Does California Code of Civil Procedure § 731 specify the State of California's express intention to waive Eleventh Amendment immunity?

(5) Has the State of California waived its sovereign immunity by its conduct in this litigation, in particular through the conduct of the DTSC?

(6) If the State of California is not a party to this case, then who is the moving party in the motion for preliminary injunction and what is that party's standing to bring the motion?

(7) What effect, if any, does the Cooperative Agreement between DTSC and the City have on these issues?

(8) In light of the DTSC and RWQCB's letter, can the City Attorney continue to represent both the People of the State of California and the City? Is there a conflict of interest? If so, what is the nature of the conflict?

(9) What does DTSC and RWQCB mean when they state in their June 23, 2002 letter "for the most part all that is required is rewording of the order so as to place obligations on Guild rather than on DTSC or the RWQCB?"

The parties were also permitted to raise any issue not addressed by the above questions which affected the determinations. Because of the importance of the above issues, the court stayed its oral ruling on the Plaintiff People's motion for preliminary injunction,[7] and continued various other pending motions. Mem. & Order, filed Jan. 28, 2002.

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[7] The court's written order on the motion had not yet been filed.

ANALYSIS

Because the court grants the Plaintiff People's motion to dismiss the RCRA claim (*see* Mem. & Order, filed April 23, 2002), several issues raised above are now moot (question numbers 2, 7, and 9).[8] Also, for similar reasons, the court does not consider whether there has been a waiver of sovereign immunity in this case (either by the assertion of a RCRA claim in federal court in the name of the "People of the State of California" [via CCP § 731] or by the DTSC's conduct in this litigation) (question numbers 3, 4, and 5). Such a ruling on waiver of sovereign immunity is premature at this time since no party has sued the "People of the State of California," the "State of California" or any agency or instrumentality of the State of California. *See Papasan v. Allain,* 478 U.S. 265, 276, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986) (the question of whether a State has waived its sovereign immunity arises as a shield after the improper assertion of claims against a State in federal court).[9] Because

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[8] The court notes that it may be necessary to decide whether California Code of Civil Procedure section 731 ("CCP § 731") permits a city attorney to bring a RCRA claim in the name of the People of the State of California to determine if sanctions should be imposed on plaintiffs' counsel under 28 U.S.C. section 1927. *See* Order to Show Cause, filed April 23, 2002.

[9] Despite this ruling, the court nonetheless notes that the conduct of DTSC and plaintiffs' counsel left the unmistakable impression that DTSC actively participated in the prosecution of plaintiffs' case. As Guild argues:

of this ruling, representatives of the Attorney General's Office and the State Agencies are no longer required to attend hearings in this case.

While the court does not consider the above questions at this time, it nonetheless must determine who is the real party in interest asserting the Plaintiff People's remaining state law nuisance claims (questions numbers 1, 6, and 8).[10]

> A candid review of the hearings held in this action since August 2001 demonstrates that DTSC's legal counsel was present at each hearing and DTSC was not only complicit in the City's representations concerning its authority to bring this action in the name of the State, but that DTSC also was an active participant in all matters before the Court, as well as Plaintiff's legal strategy and actions.

Guild's Jurisdictional Brief ("Guild's JX Brief"), filed March 12, 2002, at 18.

[10] In the first amended complaint the Plaintiff People asserts the following claims for relief: (1) abatement of a condition that may present an imminent and substantial endangerment to health or the environment under RCRA Section 7002(a)(1)(B); (2) abatement of a public nuisance pursuant to CCP § 731; and (3) abatement of a nuisance *per se* under state and municipal law (namely, the Comprehensive Municipal Environmental Response and Liability Ordinance ("MERLO"), Lode Mun. Code section 8.24.010 *et seq.*). The RCRA claim has now been dismissed. The City asserts claims for (1) recovery of response costs pursuant to California Water Code section 13304(c); and (2) recovery of abatement costs pursuant to MERLO. *See* First Am.Compl., filed May 25, 2001.

CCP § 731[11] permits a city attorney to bring an action to abate a public nuisance *under state law* "in the name of the people of the State of California." The question presented here, however, is who is the plaintiff "People of the State of California?" Is it a party separate and distinct from the City itself?

(1) *The Plaintiff People's State Law Nuisance Claims*

Preliminarily, the court briefly reviews the course of events which brought this case to this point. Leading up to the State Agencies' January 23, 2002 letter, the court treated the Plaintiff People as the State of California. Indeed, orders

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[11] Section 731 provides in pertinent part:

> A civil action may be brought in the name of the people of the State of California to abate a public nuisance, as the same is defined in section thirty-four hundred and eighty of the Civil Code, by the district attorney of any county in which such nuisance exists, or by the city attorney of any town or city in which such nuisance exists, and each of said officers shall have concurrent right to bring such action for a public nuisance existing within a town or city, and such district attorney, or city attorney, of any county or city in which such nuisance exists must bring such action whenever directed by the board of supervisors of such county or whenever directed by the legislative authority of such town or city.

were issued in reliance on that finding. *See* June 19, 2001 Mem. & Order, dismissing Guild's RCRA claim against the City; December 14, 2001 Oral Ruling, granting the Plaintiff People's motion for preliminary injunction against Guild. Such treatment of the Plaintiff People was the direct result of plaintiffs' counsel's representations to this court and the involvement of the DTSC in all aspects of this litigation. *See* Guild's JX Brief at 18-22.[12]

At the December 14, 2001 preliminary injunction hearing, the court expressed its understanding that the State of California was the moving party on the motion. *Id.* at 23 (*see* testimony cited below under section 3). Yet, neither plaintiffs' counsel nor the DTSC's counsel, who was also present at the hearing, objected to this expression of the court's understanding.

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[12] For example, at the August 21, 2001 hearing regarding the AAO, plaintiffs' counsel represented that the AAO was issued because in the determination of the City *and* the DTSC such action was necessary. *Id.* at 18. Regarding the TRO, plaintiffs' counsel stated on August 31, 2001 that "[b]oth State and City agencies were consulting with each other" and approval was obtained from "the executive levels of government." *Id.* at 19. He stated further that this action was a "consolidat[ed] ... governmental response." *Id.* at 20. Further, on September 14, 2001, plaintiffs' counsel represented that it was DTSC who had the "responsibility and authority" over the investigation of the Site. *Id.* Finally, on December 14, 2001, plaintiffs' counsel assured the court that the "dialog between the City and the State is not even weekly, your Honor, it is nearly daily." *Id.* at 22.

Consistent with this acquiescence by silence, on January 11, 2002, the Plaintiff People filed a brief in support of its revised, proposed preliminary injunction which stated that the proposed injunction represented the *collaborative* efforts of plaintiffs' counsel *and* the DTSC. *See* Pl.'s Brief re: Form of Injunction, filed Jan. 11, 2002. Additionally, the proposed injunction provided that DTSC would serve as the lead enforcement agency ensuring compliance with the terms of the injunction, and further *enjoined* DTSC in various aspects of its duties in that capacity. *See* Pl.'s Lodged Order, filed Jan. 11, 2002. It was not until January 23, 2002, two days before the hearing set on the form of the injunction, that, in a letter submitted to the court, DTSC objected to the proposed injunction and the court's prior treatment of the Plaintiff People as the State of California. The letter was especially surprising in light of DTSC's open involvement throughout the course of the litigation, including the apparent cooperative drafting of the proposed preliminary injunction, which expressly sought to impose this court's jurisdiction over DTSC. *See* Reporter's Transcript, January 25, 2002, at 4.

In light of the letter, the court ordered a representative of the Attorney General's Office and the authors of the letter to appear at the January 25 hearing. At the hearing, Donald Robinson, Assistant Attorney General, appeared on behalf of the State of California, and Derek Van Hoorn, Nicholas Stern, and Frances McChesney appeared on behalf of the State Agencies. At the hearing, for the first time, the court was informed by the Assistant Attorney General and the State

Agencies' counsel that the City Attorney of Lodi could not represent the State of California by virtue of CCP § 731, and thus, the State of California was not a party to this action. At the hearing, plaintiffs' counsel disagreed, arguing that he had a "right" and "obligation" (because the City Council of Lodi directed that the action be filed) under CCP § 731 to bring this case on behalf of the People of the State of California. Because of this disagreement, among other things, the court issued its January 28 order requesting briefing on the above issues.

Now, in response to the January 28 order, plaintiffs' counsel expressly concedes, in the jurisdictional brief, that he does not represent the State of California. Indeed, all parties and the Attorney General agree that the City Attorney of Lodi (by virtue of CCP § 731) does not represent the State of California in an action filed "in the name of the people of the State of California" to abate a public nuisance under state law. In other words, the City Attorney of Lodi's authority to prosecute a public nuisance under CCP § 731 does not elevate him to the status of agent for the State, with the full authority commensurate with such a position. *See People v. City of Los Angeles,* 160 Cal.App.2d 494, 500, 325 P.2d 639 (1958) (holding that "the only authority given to the city council of Manhattan Beach or its city attorney by section 731 of the Code of Civil Procedure is to bring an action to abate a public nuisance existing within that city").[13]

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[13] It is important to note that city attorneys, by definition, are not state officials, despite the occasional grant of authority to prosecute

Yet, while acknowledging that it does not represent the *State* of California, the Plaintiff People contend nevertheless that it represents "all of the people in the State of California." Pls.' Jurisdictional Brief ("Pls.' JX Brief"), filed Feb. 19, 2002, at 3-5. The Plaintiff People attempt to distinguish between an action brought on behalf of the "Executive Branch" of the State (which the Plaintiff People explains would be an action on behalf of the "State"), and this action which is brought on behalf of the "State Sovereign"--the "*people* of the State of California." In the Plaintiff People's view, when a city attorney acts pursuant to CCP § 731 he is acting to abate a public nuisance on behalf of the public at large; in doing so he is exercising the "sovereign" will of the "people," not the will of the "Executive Branch of State government."[14]

To *require* that the "will of the people of California" be placed in the hands of the City Attorney of Lodi when the elected Governor and Attorney General have decided not to exercise their authority, and, expressly oppose the City Attorney's assumption of such authority, seems a bizarre notion. Indeed, to construe CCP § 731 to mean that a city

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violations of specific state laws. *See generally* Cal. Govt. Code § 41801 et seq. The primary function of a city attorney is to "advise city officials in all legal matters pertaining to city business," not to prosecute violations of state law. Cal. Govt. Code § 41801.

[14] According to the Plaintiff People, because the state coffers are not exposed, the court has no jurisdiction over the State of California as it is not a party to the suit.

attorney *must act* on behalf of a separate party to wit: "all of the people of California" *in opposition* to the "State of California" turns the idea of representative government and the State Constitution on its head.

In response, the Attorney General and Guild's analysis of CCP § 731 yields a more rational result. The Attorney General asserts that "it is the City that is the plaintiff in this suit. To the extent the City represents the "people" as well [by virtue of CCP § 731], that representation extends no further than those persons who reside in the City of Lodi." Amicus Curiae JX Brief, filed March 12, 2002, at 2 (emphasis in original omitted). Relying primarily on the case of *People v. Hy-Lond Enterprises, Inc.*, 93 Cal.App.3d 734, 155 Cal.Rptr. 880 (1979), the Attorney General contends that the geographical boundaries of the city represent the jurisdictional limits of a city attorney; therefore, a city attorney cannot represent the State or the "people of the State" as a separate party apart from the city.[15]

Rather it is the Attorney General who is designated by the California Constitution as the "chief law officer of the State." Cal. Const., Art. V, Sec. 13. It is the Attorney General who "has charge, as attorney, of all legal matters in which the *State* is interested" and is directed to "prosecute or

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[15] It is clear from the amicus curiae brief, that it is the Attorney General's position that the State of California and the "People of the State of California" are one in the same.

defend all causes to which the *State,* . . . is a party." Cal. Govt. Code §§ 12511, 12512 (emphasis added). Moreover, absent the Attorney General's consent, a city attorney cannot act as the legal counsel of any state agency. California Government Code § 11042 provides that "[n]o state agency ... shall employ any legal counsel other than the Attorney General." *See also* Cal. Govt Code § 11040 (the consent of the Attorney General is required before a state agency can employ counsel "in any matter of the *State* "). Under these statutes, the Attorney General argues that the only "acceptable" interpretation of CCP § 731 is that when suit is brought to abate a public nuisance under the statute, a city attorney acts only as the legal representative of his city's residents.

Similarly, Guild contends that the city is the real party in interest when suit is brought under CCP § 731. Relying on the case of *People v. City of Los Angeles,* 160 Cal.App.2d at 494, 325 P.2d 639, Guild asserts that when the City Attorney of Lodi files suit in the name of the People of the State of California, the only interests he can represent are the City's, not the State's. Guild's JX Brief at 9.[16]

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[16] Various defendants joined in Guild's jurisdictional brief, including: Estate of Frank Paul, deceased; Estate of Dwight Alquist, deceased; Victor Leonardini; Delano Gotelli; David Mustin; M & P Investments; and Estate of Alvin Allmendinger, deceased. *See* Joinders, filed March 12 and 14, 2002.

While there is no case law (perhaps understandably) directly addressing this issue, certain cases are instructive. In *People v. City of Los Angeles,* the City Attorney for Manhattan Beach filed a lawsuit under CCP § 731. One cause of action asserted in the name of "the People of the State of California" sought to restrain the City of Los Angeles from violating a judgment entered against the City, in a prior action brought by the Attorney General. The court held that the City Attorney of Manhattan Beach could not enforce the judgment obtained by the Attorney General, even if the City Attorney sued in the name of the "People of the State of California" under CCP § 731. 160 Cal.App.2d at 500, 325 P.2d 639. The City of Manhattan Beach was not a party to the prior action. This finding suggests that even when a city attorney files suit "in the name of the people of the State of California" under CCP § 731, he represents *only* the interests of the city he serves, not the State.

Further, in *Hy-Lond,* the District Attorney of Napa County filed suit "in the name of the People of the State of California" against a corporation that operated several nursing homes in California, and then subsequently submitted a stipulated judgment settling the matter. The stipulated judgment covered all of defendant Hy-Lond's facilities in the State and included express restraints on the type of enforcement actions that could be brought against those facilities by the Department of Health Services and the Attorney General. The judgment also absolved Hy-Lond of all past violations of law. No state agency or prosecutor approved the restrictions on its jurisdiction to enforce the law.

Concerned that the language in the stipulated judgment unlawfully purported to bind state agencies and officials, the Attorney General moved to set aside and vacate the judgment. 93 Cal.App.3d at 740-43, 155 Cal.Rptr. 880.

In reversing the trial court's denial of the motion, the appellate court held that the grant of prosecutorial power to district attorneys does not include the right to restrain the powers of other public officials and agencies. The court recognized that a district attorney acts as both a county officer and a state officer, and that "in conducting the prosecution of violations of state law on behalf of the people, the district attorney is acting as an agent of the state." *Id.* at 751, 155 Cal.Rptr. 880. The court found however that the district attorney's authority did not extend so far as to permit him to compromise and bind the State's enforcement authority. *Id.* at 747-48, 155 Cal.Rptr. 880.

Although not involving CCP § 731, *Hy-Lond* instructs that there are limitations on public prosecutors' (like district attorneys and city attorneys) authority *vis a vis* the State of California. As stated by Guild in its brief, a city attorney has a mere "slice of state power" by virtue of CCP § 731 (*see* Guild's JX Brief at 7); despite being granted the authority to bring an action *in the name of the People of the State,* a city attorney does not represent the State with the full power accorded that position. *See Lake Country Estates v. Tahoe Regional Planning Agency,* 440 U.S. 391, 401, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979) (finding that political subdivisions, which have a "slice of state power" are not

protected by the Eleventh Amendment). Specifically, the court's findings in *Hy-Lond* indicate, like in the *People v. City of Los Angeles,* that a city attorney's authority is limited to the geographical boundaries of the constituency which he or she represents. *See also City of Oakland v. Brock,* 8 Cal.2d 639, 641, 67 P.2d 344 (1937) (geographical boundaries of the city represent the jurisdictional limits of a city attorney).

The court finds below that there is no rational support for the Plaintiff People's proposition, to the contrary, that under CCP § 731 a city attorney represents the "People of California" as a separate party plaintiff apart from the co-plaintiff City.

First, the language of the statute limits the action which may be taken by a city attorney "in the name of the people of California" to abate a nuisance condition which exists within the city. Arguably, however, the statute recognizes that the eradication of a public nuisance is a benefit which may accrue to California citizens who reside outside as well as within a particular city. Nevertheless, while the statute gives a city attorney the authority to act *for the benefit of* the people of California, it does not expressly confer upon the city attorney authority to *represent* all Californians as an entity separate and apart from the city itself. *See People v. City of Los Angeles,* 160 Cal.App.2d at 500, 325 P.2d 639. More importantly, though there may be other potential beneficiaries, the direct beneficiaries of the action *must* be the residents of the city whom the city attorney represents, otherwise, the city attorney would not have jurisdiction to act

in the first instance. *See City of Oakland,* 8 Cal.2d at 641, 67 P.2d 344. Therefore, the reference to "the people of California" likewise must be delimited.

Second, the court finds the Plaintiff People's argument that the "State Sovereign," the *people* of the State of California, is a recognizable entity/person separate from the *State* of California, itself, is without merit. The citizens of the State of California constitute the *State,* as the residents of Lodi (also California citizens) constitute the City of Lodi. In other words, in considering the question of who is the plaintiff when suit is brought under CCP § 731 "in the name of the people of the State of California," there are only *two* possible conclusions: (1) the plaintiff is the city which the city attorney represents or (2) the plaintiff is the State of California (a position no one urges herein). Nevertheless, the Plaintiff People assert a third option--that the plaintiff is simply "all of the people" in the State (separate and apart from the State and the City of Lodi). Such a third option does not withstand rational scrutiny of the statutory language as set forth above, and, if allowed, poses serious practical and ethical problems, which could not have been intended by the legislature in enacting the statute.

These problems were most clearly demonstrated at oral argument when the Plaintiff People's counsel acknowledged that the City Council of Lodi directed the filing of this action (*not the people of California);* the City is financing this litigation (*not the taxpayers of California);* and that any claim asserted against the "People of California" would be directed

against the City, since service would have to be made on the City. In addition, an award of damages, costs or sanctions against the "People of California" would be paid by the City, and, most importantly, the City (*not the people of California*) would be subject to any order of injunctive relief. In sum, it seems absurd to argue that the state legislature intended that under CCP § 731 a city attorney represents the "People of California" as a separate, albeit "virtual," client when the "actual" client, the city, alone, authorizes, directs, finances, and assumes complete responsibility for the litigation in which the State of California is not a party and refuses to participate. Rarely has the phrase "real party in interest" seemed *so apropos*.

Finally, were the court to find that the City Attorney of Lodi represents "the people of California," the injunction sought in this case may well have preclusive effect on the State of California, including state agencies and state prosecutors, and other local prosecutors who likewise have the statutory authority to bring actions "in the name of the People." Amicus Curiae JX Brief at 6; *see e.g.*, Cal. Govt. Code § 12607 (Attorney General has the authority to bring an action "in the name of the people of the State of California" to protect the "natural resources of the state from pollution, impairment, or destruction"). Clearly, no fair reading of CCP § 731 would support such a chaotic result.

For all of these reasons, the court finds that under CCP § 731 the City Attorney in this case has but one client--the City of Lodi. The court further finds that the real

party in interest asserting the Plaintiff People's state law nuisance claims is the City of Lodi[17].

(2) *Effect of Decision that City is the Real Party in Interest*

Because the court finds that the City is the only real party in interest bringing this case, it must decide whether to reconsider certain prior orders, including the oral ruling granting the Plaintiff People's motion for preliminary injunction and the order dismissing Guild's citizen suit against the City under RCRA § 7002(a)(1)(B). Both of these orders treated the Plaintiff People as the State of California.

As noted above, the course of conduct in this case by the Plaintiff People's counsel is of concern to the court. In particular, it appears that the manner in which this case was presented to the court may be viewed as an effort to mask the real party in interest--the City. Certainly, at this juncture, on the record now before it and in light of the court's above findings, the court has sufficient grounds to reconsider its prior orders.

Regarding the motion for preliminary injunction, Guild contends that the court should reconsider its oral ruling

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[17] Because the court reaches this decision, it does not consider Guild's various arguments concerning potential conflicts of interest which would exist if the Plaintiff People was treated as a separate entity from the City itself (question number 8).

granting the motion in order to examine several equitable and affirmative defenses Guild raised in opposition to the motion, including: (1) "equity does not permit one potentially responsible party ("PRP") [i.e., the City] to shift the entire burden for the alleged contamination through a motion for preliminary injunction"; (2) "in addition to its own liability, the City has failed to name other necessary parties whom should be parties to any injunctive relief the court may order, and about whom it had developed direct, incriminating information regarding the contamination it attributes to Guild, which information was withheld from Guild"; and (3) "[a]s a PRP for the contamination, the City cannot seek to impose joint and several liability on a few defendants when the City itself is liable for the contamination." Guild JX Brief at 2.

Guild is correct. When the court previously ruled in the Plaintiff People's favor, it considered the Plaintiff People to be a "totally innocent" party--the State of California--since no claims had been asserted against it. Now, the court finds that the State is not a party to this action and that the real party in interest is the City. The City, on the other hand, has many claims asserted against it as a PRP. This fact may dramatically affect the court's ultimate decision on the motion for preliminary injunction. Accordingly, the court VACATES its oral ruling granting the motion for preliminary injunction. The motion will have to be reset and re-briefed (at least in part) to address the new circumstances.[18] Regarding the

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[18] The court resets the hearing on the motion for preliminary injunction and a further briefing schedule below. The court is

court's order, filed June 19, 2001, dismissing Guild's citizen suit against the City under RCRA on the basis that the State was diligently prosecuting a RCRA action, Guild has filed a motion for reconsideration set for hearing on June 14, 2002. The court will address the merits of that motion at that time.

(3) ***Guild's Request for Sanctions***

Guild asserts that the actions of the City of Lodi and the City Attorney of Lodi have contributed directly to a false belief on the part of the court (and to a certain extent the parties) that the City Attorney represented the interests of the State of California in this lawsuit. "The City's actions

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highly cognizant of the fact that the parties have expended a considerable amount of time briefing the motion for preliminary injunction. Much of that briefing is still relevant to the motion, and the court does not wish to duplicate matters already fully addressed. The court intends that the supplemental briefing requested below incorporate by reference, where possible, the original briefing. The supplemental briefing should only address the impact of the City moving as plaintiff on the motion. Also, the court is informed that Guild intends to file a motion for reconsideration of the oral ruling granting the preliminary injunction on the basis of newly discovered evidence. That motion has yet to be filed, but Guild intends to notice the motion for June 14, 2002; once the court reviews the motion, it may continue the hearing on that matter to the date set below for the further hearing on the preliminary injunction. The oral ruling granting the preliminary injunction is now vacated, and it is likely that the purported new evidence in Guild's favor could be addressed in conjunction with the supplemental briefing ordered below.

included numerous oral representations in open court that the City Attorney represented the interests of the State and it was in constant communication with, and acting with the full cooperation of, levels in state government from the Governor's Office on down to the City." Guild's JX Brief at 5, 18-22. This fact is most clearly exemplified in the following colloquy which took place at the December 14, 2001 hearing on the motion for preliminary injunction: Stephen J. Meyer, counsel for Guild, stated to the court,

> [T]he State of California is not bringing the RCRA claim. It has got to be the City of Lodi, your Honor.

In response, the court stated:

> Well, the State of California has been sitting here listening to Mr. Donovan [plaintiffs' counsel] saying, 'I represent the State of California.' And I'm sure if there was a problem with that statement I would have heard about it from the State of California.
>
> * * * * * *
>
> The fact remains that the State of California has been here. A representative of DTSC has been here. She in fact offered her opinions on the tutorial. I presume she's in communication with her counsel, and that they know what's

> going on. I assume that the State of California is fully aware of Mr. Donovan's representations in this Court.

Reporter's Transcript, Dec. 14, 2001, Ex. 2 to Meyer Decl. in Supp. of Guild's JX Brief, at 77:7-23. Despite the fact that similar discussions occurred between the court and the parties, beginning as early as August 2001, it was not until the State Agencies' January 23, 2002 letter that any of the court's statements or indirect questions were challenged or answered by the Plaintiff People, DTSC, or the State.

The court expressed its concern about these course of events, at the January 25, 2002 hearing, when the court advised Derek Van Hoorn, Senior Staff Counsel to DTSC:

> Mr. Van Hoorn, you have a lot of explaining to do to this Court, and I'm giving you that opportunity in the briefing schedule. But I can assure you that what you are telling me is right on the top of my mind. It is what in the world were you doing with Mr. Donovan and the City Attorney's Office if you weren't involved directly in fashioning this [proposed preliminary injunction] order, which now you have repudiated in your letter with respect to your involvement in the order.

Reporter's Transcript, January 25, 2002, Ex. 8 to Meyer Decl., at 33:7-16.

Relying on the above record, as well as many other references to the record,[19] Guild contends that the time and resources of the court, as well as the parties, have been unnecessarily wasted, and that sanctions should issue to reimburse Guild for its past attorneys' fees and costs incurred in litigating this action as if the State of California was a plaintiff. The court has further addressed Guild's request for sanctions in its order granting the Plaintiff People's motion to dismiss the RCRA claim for relief. The court repeats here its prior finding that Guild has made a sufficient showing that an order to show cause should issue re: imposition of sanctions.

CONCLUSION

The court finds that the real party in interest asserting plaintiff People of the State of California's claims in this case is the City of Lodi. As a result, the court makes the following orders regarding various pending motions:

1. The court VACATES its oral ruling of December 14, 2001 granting the Plaintiff People's motion for preliminary injunction against Guild;

a. Said motion shall be reset for hearing on August 9, 2002 at 10:00 a.m. in Courtroom 2;

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[19] *See* Guild's JX Brief at 18-23. Said testimony further supports Guild's contentions and persuades the court that at a minimum, an order to show cause re: imposition of sanctions is warranted.

b. The Plaintiff People shall file a supplemental memorandum of points and authorities, not to exceed 40 pages in length, addressing the motion in the context of the City as the moving party on the state law nuisance claims on or before May 31, 2002;

c. Guild shall file a supplemental memorandum of points and authorities in opposition thereto, not to exceed 40 pages in length, on or before June 28, 2002;

d. The Plaintiff People shall file a supplemental memorandum of points and authorities in reply thereto, not to exceed 20 pages in length, on or before July 12, 2002;[20]

2. Plaintiffs' motion to lift stay of the court's December 14, 2001 oral ruling granting a preliminary injunction against Guild, currently set for hearing on June 14, 2002, is DENIED as moot; and

3. The continued hearing on the Plaintiff People's motion for preliminary injunction against Guild, currently set for June 14, 2002, is VACATED and reset for August 9, 2002 as set forth above.

IT IS SO ORDERED.

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[20] Both parties may also file declarations and evidence in support of their supplemental papers.

APPENDIX D

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK

(1) Federal Rules of Civil Procedure, Rule 17 (a)

Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest

(2) California Code of Civil Procedure § 731

Nuisance; action to abate, damages; parties authorized to sue; public nuisance

An action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance, as the same is defined in section thirty-four hundred and seventy-nine of the Civil Code, and by the judgment in such action the nuisance may be enjoined or abated as well as damages recovered therefor. A civil action may be brought in the name of the people of the State of California to abate a public nuisance, as the same is defined in thirty-four hundred and eighty of the Civil Code, by the district attorney of any county in which such nuisance exists, or by the city attorney of any town or city in which such nuisance exists, and each of said officers shall have concurrent right to bring such action for a public nuisance existing within a town or city, and such district attorney, or city attorney, of any county or city in which such nuisance exists must bring such action whenever directed by the board of supervisors of such county or whenever directed by the legislative authority of such town or city.

No. 02-1081

FILED
FEB 24 2003

In The

Supreme Court of the United States

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

M&P INVESTMENTS, DAVID MUSTIN, ESTATE OF FRANK PAUL, JACK ALQUIST, GUILD CLEANERS, INC., ESTATE OF DWIGHT ALQUIST, PAUL MARIANO, VICTOR LEONARDINI, AND DELANO GOTELLI,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS GUILD CLEANERS, INC. AND JACK ALQUIST'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner City of Lodi (the "City") asks this Court to review a one-sentence order from the Ninth Circuit that finds no basis for interlocutory appellate jurisdiction over an order from the district court. That district court order analyzed an issue of California law never before ruled upon by California courts and required the parties to further brief a preliminary injunction motion in light of the district court's factual finding that the State was not, and never had been, a party to the litigation. Because of subsequent appealable orders, the same question presented to this Court is now pending before the Ninth Circuit.

(1) Did the Ninth Circuit misapply a properly stated rule of law governing interlocutory jurisdiction of the federal appellate courts when it dismissed the City's appeal for lack of jurisdiction?

(2) Should this Court step in six months before trial to decide an unresolved question of California law even though the Ninth Circuit is currently considering that question?

(3) Did the district court err in determining that the City was the real party in interest when the City concedes it does not represent the State yet sues in the name of "the People of the State of California"?

LIST OF PARTIES

Petitioner's list of parties is accurate, except for the inclusion of the Attorney General of the State of California, Bill Lockyear. The State of California has not waived its sovereign immunity and has never appeared before the U.S. District Court or the Ninth Circuit Court of Appeals in this matter.

CORPORATE DISCLOSURE

No parent or publicly held company owns 10% or more of the stock of Guild Cleaners, Inc.

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JURISDICTION

Jurisdiction over the question presented by the City's petition is pending in the Ninth Circuit. The district court issued the contested order on May 3, 2002, to facilitate its consideration of the City's motions for preliminary injunction. The Ninth Circuit Court of Appeals dismissed the appeal of that order for lack of jurisdiction on September 13, 2002, and denied Petitioner's motion for reinstatement of the appeal on November 18, 2002. On December 31, 2002, the district court issued orders on the City's two motions for preliminary injunction. Pursuant to an extension of time to file its writ petition, the City of Lodi filed its petition in this Court on January 13, 2003, four days before filing in the district court a motion for reconsideration of the same contested order. On January 30, 2003, the City filed a notice of appeal to the Ninth Circuit regarding one of the injunctive orders issued by the district court, including as an issue on appeal the identity of the real party in interest pursuing nuisance abatement claims in the name of the People of the State of California[1] – the identical issue the City asks this Court to review.

STATEMENT OF THE CASE

The City invoked the jurisdiction of the United States District Court in November 2000, filing a complaint that contained a single count seeking injunctive relief under

[1] After the City noticed an appeal to the Ninth Circuit of one of two December 31, 2002 orders on injunctive relief, the City withdrew its motion for reconsideration by the district court of its May 3, 2002 order.

the Resources Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972(a)(1)(B), along with several counts seeking injunctive relief and cost recovery under state law. In April 2002, the City voluntarily dismissed its RCRA claim, and the district court exercised its discretion to retain supplemental jurisdiction over the state law claims to avoid prejudice to the parties.

The City's complaint alleged five causes of action, three for injunctive relief and two for cost recovery. The injunctive relief causes of action were brought only in the name of "the People of the State of California." The cost recovery actions were pursued only in the name of the City. Defendants Guild Cleaners, Inc. and Jack Alquist (collectively, "Guild") asserted defenses, including unclean hands, to all five causes of action and filed counterclaims against the City alleging that the City had contributed to the contamination for which it sought joint and several injunctive relief.

In Fall 2001, the City, in the name of "the People," moved for preliminary injunctive relief against Guild. That motion's prayer for relief stated: "the State requests this Court . . . issue the preliminary injunction. . . . " On December 14, 2001, the district court verbally indicated that it intended to grant an injunction to the State, took the matter under submission, and ordered further briefing on the scope and form of an order for preliminary injunctive relief. The hearing on the scope and form of the injunction was set for January 25, 2002.

Just prior to the January 25 hearing, the court received a joint letter from the California Department of Toxic Substances Control ("DTSC") and the California Regional Water Quality Control Board (the "Regional

Board"), State agencies with jurisdiction over environmental issues. The letter declared that the district court had no jurisdiction over the DTSC and the Regional Board and therefore could not bind the agencies in any preliminary injunction order.[2] In response, the district court continued the hearing on the form and scope of the order, and instead held a hearing on January 25, 2002, to determine whether the State was a party to the litigation. Following that hearing, the district court asked the parties and amicus curiae[3] to brief the issues fully.

On May 3, 2002, following further briefing and another full hearing in which the parties, the California Attorney General, and counsel for the State agencies participated, the court issued an interlocutory order, which asked: "[W]ho is the plaintiff 'People of the State of California?' Is it a party separate and distinct from the City itself?" (Pet. App. 15a.) After engaging in thoughtful analysis of the arguments presented by all parties and amicus curiae, the district court answered those questions:

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[2] The agencies stated: "DTSC and the RWQCB are not parties to the litigation, have not submitted themselves to the jurisdiction of the court, and have not waived their 11th Amendment immunity. . . . The Preliminary Injunction should not, therefore, contain language that purports to require, authorize, forbid or otherwise regulate the performance of any actions by DTSC or the RWQCB in the enforcement and oversight of proposed cleanup related activities. . . . "

[3] Amicus curiae before the district court are the DTSC, the Regional Board, and the California Attorney General. No State agency or agent has appeared in this action and, in fact, the DTSC and the Regional Board continue to assert that the federal courts have never obtained jurisdiction over any branch of California's government in regard to this case.

"[U]nder CCP § 731 the City Attorney in this case has but one client – the City of Lodi." (Pet. App. 26a.)

The district court found that the plaintiff "People of the State of California" could not be distinguished from the plaintiff "City of Lodi." Because the court's determination from the bench that injunctive relief was appropriate rested in large part upon the court's understanding that the party seeking injunctive relief was the innocent State, and not the potentially liable City, the court withdrew its December 14, 2001 oral statement regarding its intent to issue an injunction. (Pet. App. 28a.) The district court then required supplemental briefing, and reset the hearing on preliminary injunctive relief for August 9, 2002. (Pet. App. 32a-33a.)

The City appealed the district court's May 3, 2002 order to the Ninth Circuit Court of Appeals, claiming interlocutory jurisdiction based on: (1) the "dissolution" of a preliminary injunction; (2) the collateral order doctrine; and (3) the argument that the May 3, 2002 order had effectively sent a party out of court. Guild moved to dismiss the appeal, demonstrating that: (1) no preliminary injunction had ever issued and so could not be dissolved by the May 3, 2002 order; (2) the determination of the identity of a party seeking equitable relief was not collateral, but was central to the question of that party's ability to obtain injunctive relief; and (3) no party had been sent out of court. Thereafter, the Ninth Circuit dismissed the appeal for lack of jurisdiction in a one-sentence, unpublished order issued on September 13, 2002.

REASONS FOR DENYING THE PETITION

A. The Ninth Circuit Properly Dismissed the Appeal Because No Federal Statute Conferred Jurisdiction Over the May 3, 2002 Order

"A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Whether the Ninth Circuit properly dismissed the City's appeal is solely a question of whether there was a "misapplication of a properly stated rule of law." The City never claims that the Ninth Circuit applied the wrong principles of law or that incorrect statements of law were presented to that court. Instead, all the City does is repeat the arguments about jurisdiction that it made to the Ninth Circuit, the same arguments that were rejected by that court when it dismissed the City's appeal for lack of jurisdiction.

Further, the Ninth Circuit's September 13, 2002 order, from which the City petitions for review, decided only one issue: whether the Ninth Circuit had jurisdiction for review of the district court's May 3, 2002 order. The Ninth Circuit never reached the merits of the question presented by the City.

1. The Ninth Circuit's Order Does Not Determine *Any* Question of Federal Law

The City claims that review of the order is necessary and appropriate because "The Ninth Circuit's dismissal of the People's appeal decides *an important question of federal law in a way that conflicts with other appellate court decisions*." (Cert. Pet., at 5 (emphasis added).) However, the City never identifies an important question

of federal law "decided by" the Ninth Circuit's one-sentence order.

2. The Ninth Circuit's Order Does Not Conflict with the Precedents of Any Other Circuit

Although claiming there is some split among the circuit courts justifying review of this undefined federal issue, the City never cites a single case from any circuit court, including the Ninth Circuit, that conflicts with the law presented to the Ninth Circuit to support dismissal of the appeal for lack of jurisdiction.

In fact, the Ninth Circuit's one-sentence order dismissing the case for lack of jurisdiction never addressed or stated the law governing federal appellate court jurisdiction and was not published. It is hard to imagine that any federal appellate court, including the Ninth Circuit,[4] would ever cite to, reference, or rely upon the Ninth Circuit's order.

3. The Collateral Order Doctrine Did Not Confer Jurisdiction Upon the Ninth Circuit Because the Appealed Order Determined an Issue Central to the Determination of Equitable Relief, i.e., the Identity of the Plaintiff Seeking Relief

The collateral order doctrine is a limited exception to the final judgment rule. This doctrine is narrowly

[4] "Unpublished . . . orders of [the Ninth Circuit Court of Appeals] may not be cited to or by the courts of this circuit. . . . " Ninth Cir. R. 36-3(b).

interpreted, so that the exception "never be allowed to swallow the general rule" requiring a final decision of a district court as a prerequisite to jurisdiction in an intermediate appellate court. *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994).

The collateral order doctrine applies to "that small class [of decisions] which finally determine *claims of right separable from*, and *collateral to, rights asserted in the action*, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) (emphasis added). Thus, an order is collateral *only* if it conclusively determines a disputed question, resolves an important issue, which is completely separate from the merits of the case, and is effectively unreviewable upon appeal from a final judgment. *Id.* The district court's May 3, 2002 order does not meet this test.

a. The Issue Resolved in the District Court's May 3, 2002 Order Is Inseparable from the Merits of Injunctive Relief

An order is separable under the collateral order doctrine when it is "too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen*, 337 U.S. at 546. An order generally is not separable if review would require appellate courts to become "enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1981) (quoting *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963)).

In order to obtain injunctive relief, the plaintiff must demonstrate that it is likely to prevail on the merits of its claims, i.e., that it has a clear chance of demonstrating its right to relief. "The plaintiff's burden of showing a likelihood of success on the merits includes the burden of showing a likelihood that it would prevail against any affirmative defenses raised by the defendant." *Dr. Seuss Enter., L.P. v. Penguin Books*, 924 F. Supp. 1559, 1562 (S.D. Cal. 1996), *aff'd*, 109 F.3d 1394 (9th Cir. 1997); *see also Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 435 (1983) (recognizing affirmative defenses may affect plaintiff's showing of likelihood of success on the merits).[5] This is an inherent requirement of the plaintiff's burden to demonstrate likelihood of success on the merits, for the plaintiff is not likely to succeed on the merits if the defendant's affirmative defenses would prevent the court from granting equitable relief.

The district court's May 3, 2002 order held that the City of Lodi is the real party in interest seeking injunctive relief in the name of the People of the State of California. (Pet. App. 26a-27a.) Guild's answer to the plaintiff's complaint contains 35 affirmative defenses, including

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[5] *See also Division 580, Amalgamated Transit Union v. Central N.Y. Reg'l Transit Auth.*, 556 F.2d 659, 663-64 (2d Cir. 1977) (upholding district court's denial of injunctive relief due to application of defense of waiver); *Feliciano v. Gaztambide*, 836 F.2d 1, 2 (1st Cir. 1987) (recognizing role of affirmative defenses in showing for preliminary injunctive relief); *H.H. Robertson, Co. v. United Steel Deck, Inc.*, 820 F.2d 384, 388 (Fed. Cir. 1987) ("[T]he burden is always on the movant to demonstrate entitlement to preliminary relief. Such entitlement, however, is determined in the context of the presumptions and burdens that would inhere at trial on the merits."), *overruled on other grounds, Markman v. Westview Instruments, Inc.*, 52 F.3d 967 (Fed. Cir. 1995).

several equitable affirmative defenses directly affecting the merits of the City's claims for injunctive relief, such as unclean hands, and, most notably, the impropriety of the City's attempts to avail itself of the sovereign authority of the State of California.

Guild's unclean hands defense and its counterclaims are based on the City's negligent maintenance of its sewer system, chemical dumping by City employees, and installation of a monitoring well and operation of a water supply system in a manner exacerbating existing contamination. Because no one has accused the State of California of contributing to the contamination in the City of Lodi, by purporting to represent the State (or some other nebulous, never-before-recognized "virtual" party it calls "the People"), the City effectively shielded itself from any equitable defense.

These defenses demonstrate how the issues addressed in the May 3 order are inseparable from the merits of the City's claims. The May 3 order determined that the City could not cloak itself in the sovereignty of the State of California, that in fact the City was the party seeking injunctive relief. In effect, the district court determined that Guild's affirmative defenses had merit and should be considered in assessing equitable relief.

The susceptibility of a party seeking a preliminary injunction to equitable defenses that preclude a grant of injunctive relief directly impacts the adjudication of the underlying claims for equitable relief. Even the City recognizes that the determination of the identity of the party seeking equitable relief is inseparable from the merits of the determination of injunctive relief: "As an equitably innocent party against whom no counterclaims

have been asserted, the People's ability to obtain injunctive relief and to impose joint and several liability was unquestioned. That is not necessarily so for the City of Lodi however." (Cert. Pet., at 6 n.1.)

The determination of the identity of a party seeking equitable relief is in no way, in the language of *Cohen*, 337 U.S. at 546, "independent of the cause itself." Rather, to review this determination, the Ninth Circuit necessarily would have become "enmeshed in the factual and legal issues" surrounding the City's claims for injunctive relief. *Coopers & Lybrand*, 437 U.S. at 469. Thus, the district court's May 3, 2002 order determining the identity of the party seeking equitable relief is not separable, not collateral, and not immediately appealable.

b. The Collateral Order Doctrine Did Not Confer Jurisdiction on the Ninth Circuit Because the District Court's Order Was Effectively Reviewable Absent Immediate Appeal

An order is effectively unreviewable absent immediate appeal only if lack of immediate appeal would destroy the legal and practical value of an asserted right, "where denial of immediate review would render impossible any review whatsoever." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981) (quoting *United States v. MacDonald*, 435 U.S. 850, 860 (1978)); *United States v. Ryan*, 402 U.S. 530, 533 (1971)).

Considering, however, that the issue of the real party in interest on the "People's" injunctive claims is *currently pending* before the Ninth Circuit Court of Appeals, any

claim that the May 3, 2002 order was effectively unreviewable absent immediate appeal is demonstrably false.

4. The May 3, 2002 Order Did Not Send a Party Out of Court: "The People's" Motion for Injunctive Relief Has Since Been Granted by the District Court

The City argues that the "Plaintiff People of the State of California" was effectively "sent out of court" by the May 3 order. The City seems to be referring to a practical interpretation sometimes given to the final judgment rule of 28 U.S.C. section 1291. But a "final decision" is one that "ends the litigation on its merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945).

The cases cited by the City fit squarely within this definition. *See Wakefield v. Thompson*, 177 F.3d 1160, 1162-63 (9th Cir. 1999); *Ramirez v. Fox Television Station, Inc.*, 998 F.2d 743, 746-47 (9th Cir. 1993); *United States v. Lee*, 786 F.2d 951, 956 (9th Cir. 1986); *Herrington v. County of Sonoma*, 706 F.2d 938, 939 (9th Cir. 1983). In each of those cases, an order of dismissal effectively removed both a party *and all of that party's claims* from federal court without possibility of pursuing the claims or challenging an order absent immediate appeal. That is not the situation before this Court.

After the City conceded below that it did not represent the State, the district court made a determination that the party who had pursued injunctive relief was in fact the City of Lodi rather than an amorphous "all of the People of the State of California," an entity, which, according to the City, is *neither* the City of Lodi *nor* the State of California.

(Pet. App. 18a.) But the district court did *not* dismiss any claim in the action based on its determination of the real party in interest, nor did it even require the City to formally substitute itself as the party pursuing injunctive relief. The court merely corrected its earlier misapprehension that the party identified in the case caption, "the People of the State of California," was the State of California. In fact, on December 31, 2002, with full knowledge that the moving party on preliminary injunctive relief, captioned as "the People of the State of California," was the City of Lodi, the district court *granted* the preliminary injunctive relief sought by the City.[6]

And while the City claims that the Ninth Circuit's dismissal effectively sent "the People" out of court, the City ignores that there are other public prosecutors who can intervene in this action or who can take independent action to vindicate the rights of California's public at large, any of whom also can prosecute the action in the name of "the People of the State of California." In fact, as demonstrated by the California agencies' communication to the parties,[7] the State of California, including California's Attorney General, are well aware of the proceedings in

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[6] It is surprising that the City continues to assert that a party has been sent out of court, for that effectively concedes that no party before the district court can enforce the injunctive relief so recently awarded to "the People."

[7] *See supra* note 2 and accompanying text. Following issuance of the district court's May 3, 2002 order, the Regional Board again communicated with the district court, assuring the court that that agency was actively monitoring the progress of cleanup efforts in Lodi and could and would issue cleanup orders if any potentially responsible party, including the City, was not appropriately and voluntarily participating in cleanup efforts.

this matter and, if any agent of California determines that urgent action is necessary, he or she can, and will, represent "the People," either in the district court, through intervention, or in another forum.

The City is currently and actively pursuing permanent injunctive and monetary relief in the district court, on the same claims and allegations upon which it initiated this litigation. The May 3 order was issued as an integral but preliminary part of the on-going proceedings. Thus, the City's claim that the final judgment rule or any of its interpretations conferred jurisdiction upon the Ninth Circuit is facially absurd.

B. This Court Should Deny the City's Petition for a Writ of Certiorari Because the Order Appealed from Is Interlocutory

"[T]his court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *Amer. Constr. Co. v. Jacksonville, T.&K.W. Ry. Co.*, 148 U.S. 372, 384 (1893). "[E]xcept in extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1918). The lack of a final judgment is alone "sufficient ground for the denial of the application" for certiorari review. *Id.*; *see also Bhd. of Locomotive Firemen v. Bangor & Aroostock R. Co.*, 389 U.S. 327, 328 (1967) (finding a case remanded by the circuit court was not ripe for review by the U.S. Supreme Court).

To date, the City of Lodi has initiated four interlocutory appeals to the Ninth Circuit Court of Appeals. Trial in

this matter is not slated to begin until September 22, 2003. All the Ninth Circuit was asked to do was reverse the district court's determination that the City of Lodi was the real party in interest and "reinstate" preliminary injunctive relief[8] that the City contended had been granted by the district court. Under any outcome at the Ninth Circuit, dismissal for lack of jurisdiction, or consideration upon the merits and affirmance or reversal of the district court's order, the underlying action would have continued to trial on the merits and ultimate determination of the rights of the parties. There is no better example of an interlocutory order than the order the City asks this Court to review.

C. Reviewing the District Court's Order Would Require this Court to Review a Fact-Specific Order Interpreting State Law, Although the Same Order Has Not Been Previously Reviewed in Any State or Federal Court and the Same Issues Are Currently Before the Ninth Circuit Court of Appeals for Review on the Merits

The only conceivable federal question presented by the City is whether "the People," as defined by the City, is a real party in interest under Federal Rule of Civil

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[8] At the Ninth Circuit, the City cited 28 U.S.C. section 1291(a)(1) as the basis for the Ninth Circuit's jurisdiction. Guild moved for dismissal citing the only order entered after hearing on the City's motion for preliminary injunction, which reflected that the district court had taken the matter under submission, but had not ruled on the motion. The City has apparently abandoned its argument that the May 3, 2002 order conferred jurisdiction upon the Ninth Circuit under 28 U.S.C. section 1291(a)(1).

Procedure 17(a). However, as the City concedes, that determination is made under the "relevant substantive law," federal or state, that gives rise to the cause of action. (Cert. Pet., at 5.) The City seeks injunctive relief only under state nuisance law. Thus, the resolution of the issues involved in the City's petition for review requires interpretation of state law. A brief review of the City's Table of Authorities, which cites 68 sections of California law, but only three sections of federal law and one federal rule, demonstrates the state-law nature of the determinations at issue.

1. The District Court's Order Relied Upon Fact-Specific Determinations of the Actions and Motivations of the City of Lodi in Presenting Itself as the State of California

"A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings. . . . " Sup. Ct. R. 10. The issue determined by the district court's May 3, 2002 order was whether the plaintiff "People of the State of California" was an entity separate and distinct from the City of Lodi, based upon a review of both state law and the facts before the district court. The City conceded that it did not represent the State of California and proposed instead that it represented "all of the People of the State of California." The district court framed the issue:

> [W]hen suit is brought under [California Code of Civil Procedure section] 731 "in the name of the people of the State of California," there are only *two* possible conclusions: (1) the plaintiff is the city which the city attorney represents or (2) the plaintiff is the State of California (a position no

> one urges herein). Nevertheless, the Plaintiff People assert a third option – that the plaintiff is simply "all of the people" in the State (separate and apart from the State and the City of Lodi).

(Order, Pet. App. 25a.)

In determining that the City's position was without merit, the district court relied on the following factual findings:[9]

- The City Council of Lodi, not the people of California, directed the filing of the action.
- The City, not the people of California, financed the litigation.
- The City, not the people of California, directed the litigation.
- Any counterclaims asserted against the "People" would in fact be claims against the City, particularly since service would be effected upon the City.
- Any award of damages, costs or sanctions against "the People" would be paid by the City.
- Any award of injunctive relief would bind the City and not the "people of California."

These findings were predicated upon voluminous evidence presented to the district court and oral testimony of the City's attorneys during hearing on the matter. Any review by this Court would necessarily enmesh the Court

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[9] *See* Petitioner's Appendix at 25a-26a for the district court's findings.

in a determination of whether the factual findings made by the district court were accurate and were sufficient to support a determination that the City of Lodi – not some fictional, innocent party – sought injunctive relief.

2. The City Has Requested Review of a State Law Determination Before the Ninth Circuit Court of Appeals Has Considered this Issue on Its Merits

Ordinarily, this Court "accepts" and therefore does not review "save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts." *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944). Although this Court clearly has the authority to review state-law determinations by lower federal courts, in the vast majority of cases this Court declines to do so because: "The federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we [this Court] to determine how local courts would dispose of comparable issues." *Butner v. United States*, 440 U.S. 48, 57-58 (1979); *see also The Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc.*, 532 U.S. 588, 596 (2001) ("[W]e ordinarily will not consider such a state-law issue, and we decline to do so here.").

The May 3, 2002 order of the district court represents an analysis of California law in a situation of first impression – the attempt by a municipal corporation to use California Code of Civil Procedure section 731 to avoid equitable defenses by claiming to represent "the state sovereign," an entity that the City concedes is not the State of California but contends is not the City of Lodi.

The Ninth Circuit's only comment on the appeal did not reach the merits – instead it properly dismissed the appeal as a premature attempt to invoke appellate jurisdiction. However, in the period following the Ninth Circuit's dismissal of the City's appeal of the May 3, 2002 order, the district court issued two orders on the City's two separate motions for preliminary injunctive relief. One motion was granted, the other denied. The City has appealed the denial of one of its motions and has raised as an issue to the Ninth Circuit: "Who is the 'real party in interest' pursuant to Federal Rule of Civil Procedure 17(a) for the People of the State of California's public nuisance abatement claims?"

Thus, the City requests review by this Court of a question that has never been addressed by any intermediate federal appellate court and is currently before the only federal appellate court likely to consider this question of interpretation of California law – the Ninth Circuit Court of Appeals. Review by this Court prior to analysis by the Ninth Circuit would deprive this Court of the benefit of additional analysis that might aid the determination of the merits.

3. No Lower Court Has Acted in Any Fashion Requiring this Court to Invoke Its Supervisory Powers

The City claims that the district court's May 3, 2002 order represents "such a departure from the accepted and usual course of judicial proceedings . . . as to call for an

exercise of this Court's supervisory power."[10] (Cert. Pet., at 8.) The City then proceeds to analyze the issue as a matter of erroneous interpretation of state law. The City does not dispute the district court's jurisdiction over the parties. The City does not dispute the authority of the district court to analyze and interpret a state-law issue properly before it, particularly in the absence of any on-point opinion from any California court. The City does not claim that the district court deprived it of notice and an opportunity to be heard on the issues. The City does not claim *any* error on the part of the district court, except that the City disagrees with the conclusions reached by that court's May 3, 2002 opinion. How any of this rises to the level of a departure from "the accepted and usual course of judicial proceedings" that is so significant as to require intervention by the highest Court in the United States is unclear.

Generally, invocation of this Court's supervisory power is indicated when a lower federal court acts outside of its power or jurisdiction or misconstrues federal procedural rules. *See, e.g., Grupo Mexicano de DeSarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999) (power to issue preliminary injunction to prevent asset transfer where plaintiff did not claim lien or equitable interest); *Thermtron Products v. Hermansdorfer*, 423 U.S. 336 (1976) (district courts' authority to remand diversity cases for reasons other than those expressed by statute); *Bruner v. United States*, 343 U.S. 112 (1952) (jurisdiction of lower federal courts over specific statutory claims). Here, the district court's May 3, 2002 order was a sub-part of the

[10] Sup. Ct. R. 10(a).

court's consideration of a routine motion for injunctive relief.

No one has contended that the district court lacked the power or jurisdiction to clarify the identity of the party seeking injunctive relief. And while the district court cited Federal Rule of Civil Procedure 17(a), that court properly identified the real party in interest by analyzing the *state* law governing the substantive right to relief. The application of state law to the identification of parties does not justify the exercise of this Court's supervisory power.

D. The District Court's May 3, 2002 Order Was a Valid Interpretation of State Law

The City's petition for a writ of certiorari focuses on the perceived errors in the district court's analysis. Although citing a great deal of California case law in support of its position, the City misses two crucial points.

First, the City fails to acknowledge that it *conceded* that it did not represent the State, but argued that as "the People," it did not represent the City, either. None of the cases cited by the City support the proposition that there is a third, amorphous entity, neither City nor State, that can be represented by a public prosecutor under California Code of Civil Procedure section 731.

Second, there is no precedent, cited or otherwise, for use by a public prosecutor of California nuisance law to shield his or her municipality from potential liability for contributing to the very nuisance it asks the court to abate by taking on the equitably innocent mantle of "the People." This was a case of first impression, not surprisingly, and the district court used pertinent California precedent to

determine what California courts would decide in the same circumstances.

Faced with an issue of first impression under California law, the district court thoughtfully and appropriately analyzed the precedent presented and the arguments of the parties and amicus curiae, and reached a decision on the merits that was consistent with all published decisions of California courts. If a novel interpretation of *state law* is what the City seeks, its arguments should be squarely presented to *state courts*.

E. The City's Petition for a Writ of Certiorari Contains Legal and Factual Misstatements Bearing on the Issues Properly Before the Court if Certiorari Is Granted

Under Supreme Court Rule 15, an opposition to a petition for writ of certiorari "should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." Sup. Ct. R. 15.2. Honoring that rule, Guild identifies the following list of factual misstatements in the petition. Guild notes that the common feature of the listed misstatements is that, although they are presented in the Petition as conclusions of fact, they actually represent hotly contested and unresolved issues that will not be decided before the September 2003 trial. If this Court accepts review, it will necessarily be enmeshed in the considerable quantity of evidence and argument regarding these points.

- There is a significant dispute over whether the City has resolved its liability for contribution to the contamination at issue by entering

a settlement agreement with only one state agency and whether, in any event, settlement of liability equates to equitable innocence.

- The City states, as if it has been proven, that Defendant Guild Cleaners, Inc. is "at the center of and primarily responsible for the contamination." Guild in fact strongly contests its alleged liability. Further, there are *many* other parties, including the City, whose contributions to the contamination are at issue and much of the contamination in the City of Lodi is found in locations distant from the Guild facility.

- The "hot spot"[11] of contamination referenced by the City is not, in fact, "next to" the Guild facility. The "hot spot" is located approximately 80 feet to the west of Guild Cleaners, Inc., directly south of a property formerly used as a newspaper printing facility that used and disposed of the contaminants at issue. Following extensive discovery among the more than 100 parties, the relative liability of Guild, the City, the newspaper and others will be the subject of trial.

- Although the City claims that the City Council directed the City Attorney to bring public nuisance claims against the defendants below,

[11] "Hot spot" is a term coined by the City. Its exact meaning is unclear, and so the existence of a "hot spot" is also an issue of contention below.

nothing in the record has ever demonstrated any such direction by the City Council.

CONCLUSION

The City of Lodi has attempted to invoke the jurisdiction of this Court over an interlocutory order analyzing a combination of facts and state law that has never been ruled upon by any California or federal court other than the district court below. Further, the issue is wholly one of California law that will impact only parties in California. For these reasons, and because the issue is currently pending before the Ninth Circuit, the City's petition for a writ of certiorari should be denied.

Respectfully submitted,

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